LERT`97

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All Substantive Orders Listed Sequentially
Newest Case First

WCC Orders in blue
SUPREME COURT APPEALS AND CITES COLORED MAGENTA

STEPHEN A. SEARS V. TRAVELERS INSURANCE
WCC No. 9608-7594

APPEAL ED

Order And Final Judgment [5/13/98] 1998 MTWCC 43
KEY WORDS: *Final Judgment, *Offers of Proof, *Summary Judgment

Final judgment entered where offers of proof tendered by the parties would not change the conclusions reached in the Court's order denying summary judgment, which Order had the effect of granting partial summary judgment to respondent.

Order Denying Summary Judgment [4/8/97]
KEY WORDS: * *COLES*, *39-71-609(1995), *JOB DESCRIPTION, *NOTICE OF TERMINATION.

Insurer terminated claimant's temporary total disability benefits based on IME doctor's determination that claimant had reached maximum medical healing and could return to his time-of-injury job. The physician relied on a job description prepared by claimant's employer prior to his injury. The insurer gave notice of termination to claimant but not to the Department of Labor. Claimant seeks Summary Judgment holding that he is entitled to continued TTD benefits because (1) the insurer did not comply with *Coles* in that the job description was deficient and (2)the insurer did not notify the Department of

the termination.

Motion **denied.** Coles does not require that the doctor be provided with a job description which is technically accurate in all respects. The Coles criteria are intended to protect claimant against arbitrary termination of benefits and existing job description of the employer is sufficient protection. Section 39-71-609 was amended in 1995 to delete any requirement that the Department be notified where the claimant is released to return to work. The amendment is procedural and applies to termination of benefits effected after June 30, 1995.

Order Denying Motion for Reconsideration [2/24/98] 1998 MTWCC 12
KEY WORDS: *Termination of Benefits, *Notice of Termination, *39-71-116, *39-71-701, **Coles*, *Statutory Interpretation.

The Court previously denied claimant's summary judgment request that his temporary total disability benefits be reinstated on account of the insurer's failure to provide the physician releasing claimant to his time-of-injury job with a technically accurate job description. Noting that the *Coles* criteria are judicially created ones rather than ones mandated by statute, the Court declined to expand the Coles requirement that the physician base his decisions "on his knowledge of the claimant's former employment duties" to that the physician be provided a a comprehensive job description.

The matter was reargued and the initial determination is sustained with further discussion. After examining the revised statutes governing termination of benefits, the Court determines that the *Coles* criteria are inapplicable to terminations of temporary total disability benefits occurring after June 30, 1995, and reaffirms its initial statement that it will not expand the *Coles* requirement in any event. However, the decision cautions Insurers against disregarding *Coles*, pointing out that the criteria serve a good purpose and that the Supreme Court may see the matter differently if the decision is appealed.

Order Regarding Discovery [1/13/97]
KEY WORDS: *DISCOVERY, *REQUESTS FOR PRODUCTION, *INTERROGATORIES, *INDEPENDENT MEDICAL EXAMINATION, **EBI/ORION V. BLYTHE.*

Claimant has obligation to follow up in his attempts to obtain medical records from his physicians. Further responses to request for production are ordered where claimant has agreed to produce documents but has not yet received them from 3rd parties. The responses shall provide a status report on efforts to obtain the records. IME not ordered or prohibited where no motion before the Court but parties are alerted to the recent S.C. decision in *EBI/Orion v. Blythe*, which held that an IME can be conducted only by a physician licensed in Montana and to the Court's policy of compelling an IME only if it relates to issues pending before the Court.

JERRY HENRY V. STATE FUND
WCC No. 9707-7796

APPEALED
Decision and Order [5/13/98] 1998 MTWCC 42
KEY WORDS: *Eastman, *Equal Protection, *Heisler, *Occupational Disease Act, *Rehabilitation Benefits

The legislature's failure to provide workers suffering from occupational disease with rehabilitation benefits provided injured workers under the Workers' Compensation Act does not violate the claimant's right to equal protection of the laws. The Supreme Court in *Eastman* determined that different benefits under the ODA do not violate equal protection principles. *Eastman* has not been overruled either expressly or impliedly and the considerations identified in *Eastman* as the basis for distinguishing between occupational diseases and industrial injuries did not just involve cost considerations. The Supreme Court's recent decision in *Heisler* is distinguishable.

DEBRA KASTENS V. STATE FUND
WCC No. 9802-7918

Partial Summary Judgment [5/13/98] 1998 MTWCC 41
KEY WORDS: *39-72-403, *Jurisdiction, **Martin v. State Fund*, *Occupational Disease Act, **Penrod v. Hoskinson*, *Res Judicata, *Statute of Limitations

(1) The 1995 amendment of the statute of limitations for filing an occupational disease claim (§ 39-72-403) does not apply to an OD claim diagnosed in 1992, rather the 1991 statute applies. The 1995 amendment has the effect of shortening the time for filing an OD claim. *Penrod v. Hoskinson,* 170 Mont. 277, 552 P.2d. 325 (1976), specifically held that legislation shortening the limitations period does not apply retroactively unless the legislature expressly provides for retroactive application. *Martin v. State Fund*, 275 Mont. 190, 911 P.2d 848 (1996), cited by respondent is distinguishable and did not overrule *Penrod.* Since the 1995 amendment was not made retroactive, it does not apply here.

(2) Petition requesting that the Court determine that an OD timely filed is not barred by the doctrine of res judicata. Department denial of a request to extend time to file claim does not constitute an adjudication as to whether the claim was timely. Court has jurisdiction under ODA to determine timeliness of claim.

UNA (VANHORN) KILLION V. STATE FUND and the STATE OF MONTANA
WCC No. 9610-7631

Order Denying Motion to Compel Discovery and Request for Telephone Hearing [5/13/98] 1998 MTWCC 40

KEY WORDS: *Interrogatories, *Motion to Compel

Motion to compel answers to interrogatories denied where the interrogatories were duplicative in part of prior interrogatories, which had been fairly answered, and requested information immaterial to the constitutional challenge raised in the petition. Such interrogatories are an abuse of the discovery process.

DWIGHT E. DAHL, d/b/a BIG SKY CONCRETE V. UNINSURED EMPLOYERS' FUND
WCC No. 9707-7778

Order on Appeal [5/12/98] 1998 MTWCC 39
KEY WORDS: *39-71-401, *Insurance, *Temporary Employee, *Uninsured Employer, *Workers' Compensation Insurance

Where appellant business obtained and utilized employees from a temporary employee agency and the employees were covered by workers' compensation insurance secured by and through the agency but for which it was reimbursed by the business, the business is not an uninsured employer and is not subject to penalties applicable to uninsured employers. It makes no difference whether some or all of the workers furnished the employer meet the definition of temporary employee or are deemed the business' employees. The insurance requirement of the WCA does not require that the policy be in the name of the employer, only that the employer procure insurance covering the employees. Here the employer, utilizing the agency, procured such coverage. Department determination declaring business uninsured is reversed.

JOHN SLOAN V. AMERICAN HOME ASSURANCE COMPANY
WCC No. 983-7938

Protective Order [5/8/98] 1998 MTWCC 38
KEY WORDS: *Independent Medical Examination, **Larson v. Cigna*, *Protective Order

Protective Order granted. The Order prohibits a medical examination scheduled by the insurer with claimant's cardiologist. The claimant asserts he is permanently totally disabled on account of orthopedic injuries suffered in an industrial accident and must prove such. That he might also be disabled on account of his heart condition is irrelevant. *Larson v. Cigna Ins. Co,* 271 Mont. 98, 894 P.2d 327 (1995).

WILLIAM POLK V. PLANET INSURANCE COMPANY
WCC No. 9603-7525

Order Denying Motion for Reconsideration [5/7/98] 1998 MTWCC 37
KEY WORDS: *Reconsideration, *Remand

Motion for reconsideration of this Court's order remanding to the Department of Labor is denied. The plain terms of the Supreme Court decision require remand. The Supreme Court decision does not provide specific instructions for the Deparment to follow upon remand and it would be improper for this Court to, at this time, insert any.

REVERSED AND REMANDED (December 30, 1997)
KEY WORDS: *CAUSATION, *CLEARLY ERRONEOUS, *39-72-408, *AGGRAVATION, *39-72-706(1), *BURDEN OF PROOF, *OCCUPATIONAL DISEASE, *OCCUPATIONAL DISEASE PANEL, *MEDICAL TESTIMONY, *JUDICIAL REVIEW, *SUBSTANTIAL EVIDENCE, *ERROR OF LAW.

Supreme Court "hold[s] that Polk **need not prove** that occupational exposures were the major or substantial factor causing his chronic pulmonary condition. Rather, Polk **must prove** that he is suffering from a disease that is **proximately caused** by his employment ***or*** that exposure to dust and other irritants while in the course of his employment at Koch **contributed to or aggravated a preexisting condition**." (italics in original, bold added) WCC erred in reviewing only for clearly erroneous findings of fact, should have determined whether hearing examiners decision was affected by an error of law. Finally, when the standard of causation is changed to comport with this decision there is substantial evidence to find for the claimant as his occupation **substantially aggravated** Polk's pulmonary condition. Claimant is entitled to pro rata compensation for his disease.

Order and Judgment [2/26/97]
KEY WORDS: *BURDEN OF PROOF, *PRESUMPTIONS, *OCCUPATIONAL DISEASE PANEL, *MEDICAL TESTIMONY, *JUDICIAL REVIEW, *SUBSTANTIAL EVIDENCE, *DUE PROCESS, *EQUAL PROTECTION, HARMLESS ERROR.

Decision of the Department of Labor and Industry finding that claimant does not suffer from an occupational disease is affirmed. The medical evidence was conflicting. The hearing examiner did not misapprehend the evidence and his resolution of the conflict was supported by substantial evidence. The medical panel procedure and presumption of correctness did not violate claimant's constitutional rights to substantive due process, procedural due process, or equal protection. Any error in the procedure and presumption harmless in any event.

Order Granting Motion to Amend & Denying Motion to Dismiss [4/26/96]

KEY WORDS: *MOTION TO DISMISS, *PLEADING, *APPEAL.

Pleading styled as a "petition" will be treated as a notice of appeal where petitioner is in fact appealing a DLI decision. Petitioner's notice concerning witnesses and exhibits will be ignored lacking leave of court to present additional evidence and an order remanding the case to the DLI for such evidence.

ARVIL RAY KING V. STATE FUND
WCC No. 9712-7890

Order Denying Motion to Strike Answers to Requests for Admission [5/4/98]
1998 MTWCC 36
KEY WORDS: *Interrogatories, *Requests for Admissions

Motion requesting, in effect, that facts set forth in interrogatories styled as requests for admissions be deemed admitted because the opposing party failed to respond to them timely is denied. The WCC has not adopted the automatic admission provision of Rule 36, MONT.R.CIV.P. Under WCC Court rules, requests for admission may be propounded as interrogatories, however, the consequences of a failure to answer them is the same as for a failure to answer any other interrogatory, i.e., a motion to compel or for sanctions.

ROBERT C. KEMP V. SEDGWICK CLAIMS
WCC No. 9801-7897

Amended Order on *In Camera* Inspection [5/6/98] **1998 MTWCC 35A**
KEY WORDS: *Attorney-Client Privilege, *Discovery, *Request for Production, *Surveillance

Correspondence between an attorney and respondent's insurance adjuster is protected by the attorney-client privilege and are not discoverable. Copies of cases sent in connection with the correspondence are not discoverable since they would disclose the attorney's thought processes in connection with the attorney-client correspondence. Surveillance reports are discoverable only to the extent that they relate to matters to which the investigator may testify. Motion to compel discovery denied in part, granted in part.

ANGELA HEATH V. MONTANA MUNICIPAL INS. AUTHORITY
WCC No. 9702-7700

AFFIRMED 5/5/97

Order Granting Summary Judgment [9/25/97]
KEY WORDS: *TRAVEL, *COURSE AND SCOPE, *39-71-407 (1987), * *MURRAY HOSPITAL V. ANGROVE, *GRIFFIN V. INDUSTRIAL ACCIDENT FUND, *VOORHIES V. PARK CAFE, *NICHOLSON V. *ROUND UP COAL MINING*.

Fall on public sidewalk adjacent to public street while on the way to work did not occur in course and scope of employment. The sidewalk was not part of the employer's premises even though the employer was the city and maintained the sidewalk and even though the

sidewalk was in front of the city building where claimant worked. The sidewalk was maintained for used by the general public not just by city employees and persons having city business, It had no connection to the employment. *Murray Hospital v. Angrove, Griffin v. Industrial Accident Fund* and *Voorhies v. Park Cafe* followed. *Nicholson v. Round Up Coal Mining* distinguished.

MICHAEL BARE V. LIBERTY MUTUAL FIRE INS. CO.
WCC No. 9704-7739

AFFIRMED 5/4/98
Order and Judgment Dismissing Petition [5/27/97]
KEY WORDS: *JURISDICTION, *MEDICAL PANEL, *EXHAUSTION, 39-71-1012 (1989).

Medical panel procedures in effect at the time of a claimant's injury (2/14/90) must be followed and exhausted before the Workers' Compensation Court has jurisdiction over a claim for permanent total disability. Prior holdings of WCC followed.

TOBY McADAM V. NATIONAL UNION FIRE INS. CO. OF PITTSBURGH
WCC No. 9712-7883

Order Denying Request For Rehearing [4/29/98] **1998 MTWCC 34**
KEY WORDS: *Motion for New Hearing, *New Trial

Motion for rehearing denied. Petitioner argues that the Court's conclusions of law are inconsistent with its findings of fact, however, the Court finds that such is not the case. An MRI report submitted by claimant may be grounds for a new petition but is submitted too late to be considered in connection with a request for rehearing.

Findings of Fact, Conclusions of Law and Judgment [3/23/98] **1998 MTWCC 28**
KEY WORDS: *39-71-116(22)(1995), *39-71-703, *Impairment, *Medical benefits, *Permanent Partial Disability

Claimant not entitled to permanent partial disability benefits where he had no rateable impairment as a result of his industrial accident. His request for additional medical testing is denied where based on his personal opinions and not supported by any doctor.

EBI/ORION GROUP V. MICHAEL S. BLYTHE
WCC No. 9407-7089

AFFIRMED 4/28/98

Findings of Fact, Conclusions of law and Judgment on Remand [6/20/97]

KEY WORDS: *MALINGER, *CREDIBILITY, *REWEIGH EVIDENCE, *REMAND

Supreme Court ordered a reweighing of the evidence as to malingering; contrasting the testimony of claimant's experts, including Dr. Stratford, with the testimony of the insurer's remaining expert, Dr. Faust. Court found that its function is not as limited as suggested by the Supreme Court. Resolution of the claim requires that I consider claimant's credibility. After factoring out the testimony of the psychologist, the evidence supports a finding that claimant is a malingerer. Claimant was neither credible nor truthful. Dr. Stratford lost his objectivity concerning the claimant. Dr. Faust, on the other hand, impressed and persuaded the Court. Claimant is not suffering from a schizoaffective disorder or any other psychotic diagnosis.

EBI/ORION GROUP v. BLYTHE, _____ Mont. _____ , _____ P.2d _____, _____ St. Rep. _____ (1996). **Reversed and remanded - January 7, 1997**

KEY WORDS: *PSYCHOLOGICAL CONDITIONS, *MALINGERING, *INDEPENDENT MEDICAL EXAMINATION, *TREATING PHYSICIAN, *39-71-605, *39-71-116(30).

Supreme Court finds Workers' Compensation Court erred in ordering an independent medical examination by a psychologist who is neither a physician nor licensed to practice in the State of Montana. Remanded for new findings and conclusions which do not consider the testimony and evidence of the IME.

Findings of Fact, Conclusions of Law and Judgment [2/08/96]

KEY WORDS: *PSYCHOLOGICAL CONDITIONS, *MALINGERING, *PERMANENT TOTAL DISABILITY.

Claimant was stuck six years prior by an AIDS infected needle but did not contract HIV or AIDS. However, he claims that the incident precipitated disabling psychosis and depression. The Court finds that his mental illness is malingered. His claim for further disability benefits is denied.

Order for Independent Medical Exam [6/6/95]

KEY WORDS: *INDEPENDENT MEDICAL EXAMINATION, *PHYSICIANS, *39-71-605, *RULE 35, MONT.R.CIV.P.

Although the Court's rules contain no express provision for an IME, the Court may order an IME pursuant to section 39-71-605, MCA, which entitles an insurer to an IME at any time. In a case involving alleged mental disability, a Ph.D. psychologist may be considered a "physician" for purposes of the IME statute. Claimant's allegation any exam would be invalid because he is taking anti-psychotic drugs is unsupported by any evidence. Exam ordered.

Order Compelling Production of Military Records [6/1/95]

KEY WORDS: *DISCOVERY, *PRODUCTION, *MEDICAL RECORDS, *MILITARY

RECORDS

Where claimant is claiming he is psychologically disabled on account of his industrial injury, military records containing psychological evaluation and information are discoverable even though twenty years old.

DARCEE BENNETT V. STATE FUND
WCC No. 9801-7902

Findings of Fact, Conclusions Of Law and Judgment [4/22/98] 1998 MTWC C 33
KEY WORDS: *39-71-741 (1991), *Best Interests, *Lump Sum Advance, *Lump Su m Conversion

Request for lump s um conversion denied where the claimant, who is permanently totally disabled, had already been advanced $20,000 and provided insufficient justification for a conversion of her entire future benefits. The 1991 Workers' Compensation Act limit s partial lump sum advances to a total of $20,000, and claimant at best submitte d justificat ion for another partial advance. In any event, the request must be denie d because it is not in claimant's best interests. She is 37 years of age and ha s approximately 28 y ears until retirement, and her workers' compensation benefits are her sole prospective income since she is not eligible for social security disability benefits . Moreover, she and her husband have a poor financial track r ecord. The best interest test, while not expr essly set forth in the 1991 Act, is implicit in the requirement that lump-sum advances and conversions must be the exception, not the rule.

W.R. GRACE & CO. AND TRANSPORTATION INS. CO. V. KAREN RILEY
WCC No. 9709-7824

Order Denying Motion for Rehearing [4/22/98] 1998 MTWCC 32
KEY WORDS: *New Trial

Motion for rehearing denied where the motion was a request that the Court order recoupment of overpayments and the motion was based on evidence not presented prior to the Court's judgment. The record was closed upon submission of t he case for decision.

MONTANA SCHO OLS GROUP WORKERS' COMPENSATION RISK RETENTION PRO GRAM V. DEPARTMENT OF LABOR AND INDUSTRY/EMPLOYMEN T RELATIONS DIVISION
WCC No. 9309-6893

Order Regarding Assessment Rules [4/21/98] 1998 MTWCC 31
KEY WORDS: *39-71-201 (1991), *Rulemaking, *Rules, *Workers' Compensatio n

Assessment

Workers' compensat ion assessment rules promulgated subsequent and pursuant to this Court's 1995 decision are invalid and void since they failed to properly consider an d identify direct costs as man dated by the decision and section 39-71-201 (1991), MCA. It will hold an evidentiary hearing to identify direct costs. That portion based on indirec t costs will stand. The Court will determine what to do with direct costs after hearing.

GREG KEMP V. CIGNA PROPERTY & CASUALTY
WCC No. 9711-7866

Contempt Order [4/16/98] 1998 MTWCC 30
KEY WORDS: *3-1-501, *Contempt

Claimant who lied under oath in workers' compensation proceeding held in contempt of Court and fined $200. Maximum fine not imposed because the Court took int o consideration the fact that he admitted his misconduct.

Findings of Fact, Conclusions of Law and Judgment [3/2/98] 1998 MTWCC 15
KEY WORDS: *Accident, *Credibility, *Injury

Despite finding that many parts of claimant's testimony were not credible, the Cour t nonetheless finds that claim ant suffered an industrial injury to his back when unloading a shower stall from a truck. The incident was corroborated at least in part by anothe r person. Claimant had no prior hist ory of back problems. The emergency room report for the evening of the incident indicated that claimant was in significant pain and that i t appeared he was suffering a back strain. There was no counter-evidence indicating that claimant could have hoodwinked the ER physician. Benefits limited.

JACK MURER, et al V. STATE FUND
WCC No. 9206-6487

Order for Contempt and Limiting Use of Confidential Information [4/16/98]

1998 MTWCC 29
KEY WORDS: *3-1-501, *Attorneys, *Contempt

Attorney held in conte mpt for misrepresenting the purpose of his contacts with claimants who may receive benefits as a result of the precedent set in this case and whose identities he learned as a result of Court directed disclosure by the insurer. An attorney owes the Court a duty to be forthright and truthful in their representations to the Court.

Order Awarding Attorney Fees [3/2/98] 1998 MTWCC 14

KEY WORDS: *Attorney Fees, *Murer

Upon remand after the Supreme Court determined that under the "common fund" doctrine the petitioners' attorneys are entitled attorney fees with respect to payments received by non-party claimants as a result of the precedent established in this case, the WCC approves the parties agreement for a 15% attorney fee as to all Murer payments. The 15% is found reasonable and supported by an overwhelming majority of claimant's who replied to the Court's notice about the proposed fee.

Order Concerning Identification and Payment of *Murer* Benefits [3/2/98]
1998 MTWCC 13
KEY WORDS: *Attorney fees, *Murer, *Settlement

Order establishes criteria and procedure for reviewing settlements for injuries occurring during the *Murer* period (July 1, 1987 to June 30, 1991), to determine further entitlement. The following are the major features of the Order: 1) Claims settled on a disputed liability basis are deemed closed and are not subject to further review. 2) Compromised claims shall be reviewed on a case by case basis. 3) Claims which show that Murer benefits were paid or taken into account are deemed closed but attorney fees of 15% on the Murer portion shall be paid. 4) Certain settlements with attorney representation deemed closed. 5) Other settlements to be reviewed to determine if Murer benefits due.

_____ Mont. _____ , _____ P.2d _____, _____ St.Rep. _____ (1997). Affirmed in part, Reversed in part, Remanded. 6/23/97
KEY WORDS: *MURER, *SETTLEMENTS, *LAW OF THE CASE, *ATTORNEY FEES, *COLA, *PENALTY, *REASONABLENESS.

Supreme Court reversed finding that 1987 cap expired July 1, 1991, rather it expired on July 1, 1989. Affirmed holding that settlement agreements executed during pendency of litigation barred further claim to Murer benefits, concluding that any ambiguities must be strictly construed against the party who created them, in this case claimant's attorneys. Affirmed conclusion that a claimant's was entitled to an increase in his lump sum award per *Murer II,* and additionally per holding that 1987 cap expired in 1989 granted increase for years of '89 through '91 which had been denied by the WCC. Affirmed penalty award. Reversed WCC and granted attorney fees based on the common fund doctrine.

Stay of Judgment [12/04/95]
KEY WORDS: *STAY OF JUDGMENT

Stay of execution of benefit payments by the State Fund pending completion of the appeal process.

Final Decision and Judgment [11/20/95]
KEY WORDS: *MURER, *SETTLEMENTS, *LAW OF THE CASE, *ATTORNEY FEES, *COLA, *PENALTY, *REASONABLENESS.

Complex decision holding that settlement agreements executed during pendency of litigation barred further claim to Murer benefits and that Supreme Court's decision in Murer II precludes consideration of claimant's argument that the 1987 cap expired July 1, 1989. COLA awarded one claimant. Increase in impairment award made in another. Some attorney fees and penalty awarded.

Order Staying Attorney Fee Ruling, Authorizing Continued Withholding of Lien Amounts [9/25/95]
KEY WORDS: *STAY OF JUDGMENT, *ATTORNEY LIEN.

Order dissolving attorney fee lien stayed in light of petitioners' expressed intention to appeal the Court's ruling. Compelling the State Fund to immediately pay the 20% disputed fee could subject it to double payment of the 20% if petitioners' prevail on appeal. Therefore, State Fund is authorized to continue to withhold the disputed amount.

Order Denying Fees Under Common Fund Doctrine [8/07/95]
KEY WORDS: *ATTORNEY FEES, *COMMON FUND DOCTRINE, *SUBSTANTIAL BENEFIT DOCTRINE, *JURISDICTION.

Request for attorney fees from amounts which may be owed non-party claimants as a result of petitioners' success in *Murer II* denied. Common fund and substantial benefit doctrines held inapplicable.

Order Scheduling Case for Trial [6/1/95]
KEY WORDS: *MURER, *REMAND

Order setting case for trial to resolve remaining issues after remand by Supreme Court. Discussion between counsel regarding identification and consolidation of further litigation breaks down. Only issues to be resolved are those presented in connection with petitioners in this case.

Order Denying Renewed Motion for Class Certification [4/05/95]
KEY WORDS: *RES JUDICATA, *LAW OF THE CASE, *CLASS ACTION.

Renewed motion for class certification denied. Original denial dispositive and in any event the typicality requirement for class certification is not met because of factual differences among potential claims.

Order Regarding Intervention and Attorney Lien [3/08/95]
KEY WORDS: *ATTORNEY FEES, *ATTORNEY LIEN, *INTERVENTION, *RULE 24,

MONT.R.CIV.P.

Where attorney asserts lien with regard to benefits which may become due to claimants he does not represent, affected claimants may intervene to oppose the lien. Broader intervention denied since intervenors failed to show common issues of fact or law with respect to other matters. Asserted lien places insurer in a dilemma and it is entitled to protect its own interests.

LAURENCE GAYLE KIEFER V. LIBERTY NORTHWEST INS. CORP.
WCC No. 9712-7889

APPEALED

Findings of Fact, Conclusions of Law and Judgment [3/23/98] **1998 MTWC C 27**
KEY WORDS: *Accident, *Credibility, *Injury, *Medical Evidence

Claimant not credible. Court rejects his claim that he suffered an industrial accident on July 15, 1997. Moreover, his claim is not suppo rted by objective medical evidence or any medical opinion.

W.R. GRACE & CO. AND TRANSPORTATION INSURANC E CO. V. KAREN RILEY
WCC No. 9709-7824

Declaratory Judgment [3/23/98] **1998 MTWCC 26**
KEY WORDS: *39-71 -721, *39-72-701, *39-72-702(2), *Beneficiaries, *Death Benefits, *Due Process, *Equal Protection, *Full Redress, *Manweiler

Lump sum received by claimant prior to his death must offset death benefits due hi s beneficiaries following his death to the extent that the lump sum exceeds the amount of biweekly benefits the claimant would have received prior to death. Social security offset must be used in calculating that period if the claimant was receiving social securit y disability benefits while living. It may not be used in computing the amount of th e beneficiary's biweekly amount. Constitutional challenges to the statutes rejected.

MICHAEL HEISLER V. STATE FUND **WCC No. 9403-7015**

APPEALED
Order and Judgment Denying Attorney Fees and Penalty and Awarding Costs [3/17/98] **1998 MTWCC 25**
KEY WORDS: *Attorney fees , *Law of the Case, *Penalty , *Remand , *Res Judicata

Claimant not entitled to attorney fees or penalty after where he was provided wit h opportunity for an evidentiary h earing and argument on attorney fees and penalty prior to

appeal but declined to proceed and where the only issue on appeal was the constitutionality of a statute. Dismissal of the petition encompassed dismissal of the penalty and attorney fee requests, and that dismissal was not reversed on appeal. Law of the case applies.

RANGER INSURANCE COMPANY V. VELLEDA BATES
WCC No. 9709-7821

APPEALED
Order Affirming Order of the Department of Labor and Industry with Modifications
[3/16/98] 1998 MTWCC 24
KEY WORDS: *Administrative Agencies, *Administrative Law, *Attorney Fees, *Final Order, *Madill, *Summary Judgment.

Department summary judgment for attorney fees affirmed with modifications. Summary judgment may be used by Department where no material facts are controverted. The award of attorney fees is governed by Madill v. State Compensation Ins. Fund, which applied the 1983 version of 39-71-612 which is applicable here. Where insurer resisted conversion of benefits from TTD to PTD, claimant petitioned the WCC, and the insurer thereafter accepted liability for PTD, the acceptance constitutes a settlement within the meaning given that word in Madill, thereby entitling claimant to an award of add-on attorney fees on all future PTD benefits. Hearing officer erred in directing parties to look at Wight factors since claimant sought only the contingent amount. His order is amended to award 25%. Claimant's request for 33% rejected since the settlement to which the attorney fee attaches was obtained without going to hearing. Summary judgment was a final, appealable order since the attorney fee is a sum certain requiring only arithmetical calculation and because claimant did not request calculation of the fee, she requested only that the Department determine her entitlement.

Order Granting Motion to Strike Cross-Appeal [12/30/97]
KEY WORDS: JUDICIAL REVIEW, APPEAL, JURISDICTION, TIME FOR FILING

Cross-appeal filed more than 30 days after decision of Department is untimely and stricken. Section 2-4-702, MCA, and ARM 24.29.215(3) provide that petitions for judicial review (appeals) must be filed within 30 days of the agency's final decision. A cross-appeal is an appeal. Absent some other specific time set out for a "cross" appeal, it must be filed within 30 days.

JEREMY SHAUN VALANCE V. STATE FUND
WCC No. 9802-7928

Judgment [3/10/98] 1998 MTWCC 23
KEY WORDS: *Jurisdiction, *Lump sum, *Medical benefits, *Settlement

Final lump sum agreement approved by the Court and entered as a judgment where parties agreed on the settlement but one party was unwilling to execute it unless the Court approved it. Lump-summing and closure of future medicals approved where claimant and insurer had disputes over the years and the claimant became so unhappy with his dealings with the insurer that it now interferes with his treatment and where a mental health counselor and treating physician urge that he settle his medical claims so that he can manage his own care and proceed with treatment as he sees fit.

DOUG LOCKHART V. NEW HAMPSHIRE INSURANCE CO.
WCC No. 9705-7746

Order Inviting Amicus Curiae Briefs and Directing Withholding of Attorney Fees [3/4/98] 1998 MTWCC 22
KEY WORDS: *Amicus curiae, *Medical Benefits, *Attorney Fees, *Attorney Lien

Court orders further briefing and invites amicus briefs with respect to whether an attorney fee with respect to medical benefits obtained by the attorney on behalf of claimant is to be taken out of the medical benefits or out of claimant's compensation benefits.

Findings of Fact, Conclusions of Law and Judgment [12/11/97]
KEY WORDS: *ACCIDENT, *INJURY, *AGGRAVATION, *MEDICAL TESTIMONY, *39-71-407 (1995), *39-71-119 (1995).

Fifteen years ago claimant has a Scilastic (silicon) bone implant in his wrist. Time has shown that such implants inevitably fail and often fragment. Claimant worked as a laborer, mostly in construction, for 15 years with a single incident of wrist pain almost 12 12 years ago. Then, on a single day he experienced onset of disabling pain while hammering in a nail. The medical evidence, with a physician hired by the insurer reading x-rays as showing the implant intact and disputing that claimant could have been asymptomatic over all those yeas. Two other physicians who treated claimant read x-rays as showing a fragment had broken off the implant and the physician who did the implant related the fragment to claimant's hammering and testified that claimant aggravated his condition and caused it to become symptomatic. The Court found claimant's treating physicians more persuasive in view of, among other things, (1) lack of any direct evidence contradicting claimant's history of his condition being asymptomatic; (2) claimant's ability to work all those years and no evidence that such ability had been gradually diminishing; (3) the fact that the insurance company doctor does hundreds of IME's a year for insurance companies; and (4) the fact that a second physician read the x-rays as showing fragmentation of the implant.

LIBERTY NORTHWEST INSURANCE CORP. V. NANCY PETAK/COMMUNITY MEDICAL CENTER
WCC No. 9711-7872

Order Denying Community Medical Center's Motion to Dismiss [3/4/98]
1998 MTWCC 21
KEY WORDS: *Attorney Fees, *Attorney Lien, *Jurisdiction, *Medical Benefits

The insurer/petitioner seeks guidance on payment of medical benefits and attorney fees in this case. It initially denied liability for the claim but after claimant filed a petition, it accepted liability and agreed to pay benefits. The prior action involved an attorney, who thereby became entitled to a fee out of the benefits he obtained on claimant's behalf and to a lien for those fees. The insurer's checks for each medical provider was payable jointly to the provider, the claimant, and the attorney. One medical provider – Community Medical – insisted on full payment with no deduction for fees and the check remains uncashed. Community was named as a co-respondent and moved to dismiss on the ground that the Court lacks jurisdiction. The motion is **denied.** The matter involves the distribution of medical benefits and an attorney lien, matters over which the Court has jurisdiction.

KEITH WARREN SMITH V. OLD REPUBLIC INSURANCE CO.
WCC No. 9710-7842
APPEALED 3/31/98
Findings of Fact, Conclusions of Law and Judgment [3/4/98] 1998 MTWCC 20
KEY WORDS: *Medical Benefits, *Medical Referrals, *Out-of-state Medical Treatment, *Travel Reimbursement

Claimant not entitled to medical reimbursement and travel expenses for a visit to a physician in Seattle, Washington where he failed to provide medical evidence showing that the visit was medically necessary or reasonable. His visit was based on self-diagnosis of thoracic outlet syndrome and his treating physician, who initially provided the referral, did not seriously entertain that diagnosis, did not believe in any event that any surgery was warranted, and opined that there were adequate specialists in thoracic outlet syndrome in Montana.

Z WORKS, INC. V. GWYN BARNABY/UNINSURED EMPLOYERS' FUND
WCC No. 9710-7840

Order Granting Summary Judgment [3/3/98] 1998 MTWCC 19
KEY WORDS: *39-71-118(1) (1995), *39-71-120 (1995), *39-71-401 (1995), *39-71-401(3) (1995), *Employee, *Independent Contractor, *Uninsured Employers' Fund

Summary judgment granted to UEF against petitioner, Z Works, which had claimed that it was not liable for an injury suffered by Gwyn Barnaby while she painted for Z Works. Petitioner alleged that Barnaby was an independent contractor and, in the alternative, was estopped from making a workers' compensation claim because, as Z Work's bookkeeper, she had advised it that

workers' compensation coverage was unnecessary. It is uncontested that Barnaby, who was injured on October 4, 1996, did not have an IC exemption; lacking such exemption she was not an IC. §39-71-120 and -401(3), MCA (1995). (The exemption requirement was repealed in 1997.) The estoppel argument is rejected because advice by Barnaby or anyone else cannot relieve an employer of its statutory obligation to provide insurance.

BARBARA BIRCH V. LIBERTY MUTUAL FIRE INSURANCE CO.
WCC No. 9705-7747

Order Dismissing With Prejudice [3/3/98] 1998 MTWCC 18
KEY WORDS: *Caekaert, *Judicial Estoppel

Court finds that claimant is judicially estopped from pursuing a workers' compensation claim with respect to an April 28, 1994 injury, where following injury she filed a negligence action against Cut Bank IGA Store (IGA), her putative employer, and successfully resisted IGA's motion for summary judgment alleging she was an employee, then settled with IGA for $60,000. Her affidavit and testimony in the district court action were plainly calculated to portray her as an independent contractor and she unequivocally and vigorously asserted she was an independent contractor. The facts on which the issue was based were frozen as of the time of the injury -- unlike *Caekaert*, there was no uncertainty as to future facts. Judicial estoppel applies to positions taken, as well as testimony, and applies even though the insurer was not a party to the prior proceeding.

RON BEAULIEU V. UNINSURED EMPLOYERS' FUND AND HUMAN DYNAMICS
WCC No. 9712-7880

Order Granting Motion to Protective Order in Part, Denying the Motion in Part, and Denying Sanctions [3/2/98] 1998 MTWCC 17
KEY WORDS: *Attorney fees, *Discovery , *Interrogatories, *Protective Order, *Requests For Production

Motion for protective order granted in part, denied in part. Discovery relating to medical information must be answered since medical payments are at issue and there is a n obligation in any event to exchange medical information. Where claim accepted an d benefits paid, and claimant is seeking a penalty with respect to the paid benefits , discovery about the subsequent injuries, income, and similar matters is not reasonabl y calculated to lead to relevant, admissible evidence and is improper. Discovery concerning when benefits were received is relevant and proper. Attorney fee request by respondent denied since claimant prevailed in part.

Order Denying Motion to Dismiss Uninsured Employers' Fund [3/2/98]
1998 MTWCC 16
KEY WORDS: *Motion to Dismiss, *Parties, *Plea ding, *Uninsured Employer, *Uninsured

Employers' Fund

Motion of respondent Human Dynamics, Inc. (HDI) to dismiss UEF is denied. Claimant has alleged that the employer (Eurek a Pellet Mills) was either insured or uninsured at the time of her industrial accident and seeks medical benefits. HDI responds that it insures Eureka and has accepted liability for the claim, although it disputes the medical benefits at issue. UEF alleges that HDI is not a Montana insurer, E ureka was therefore uninsured, and that it is willing to accept liability. HDI asserts that since it a dmits it is an insurer, there is no controversy involving UEF. The contention is rejected. Claimant has pled in th e alternative. HDI's response has no greater weight than UEF's response.

GUY WALL V. NATIONAL UNION FIRE INSURANCE COMPANY
WCC No. 9701-7682

Findings of Fact, Conclusions of Law and Judgment [2/24/98] 1998 MTWCC 11
KEY WORDS: *Attorney Fees, *IME, *Occupational Disease, *Penalty, *Treating Physician, *Unusual Strain

Court finds that claimant suffered a work-related injury to his left knee when he stepped off a ladder on a rail car, felt excruciating pain in his knee, and collapsed to the ground. Insurer's denial of the claim and refusal to pay for arthroscopic was unreasonable. While it obtained an IME opinion that claimant did not suffer an industrial injury but was suffering a disease of the knee which was 50% occupationally related, it disregarded the treating physician's opinion where the treating physician had special training and expertise in knee surgery and diagnosis, and plainly had the greater expertise in knee conditions, indeed the insurer put its head in the sand and refused seek an IME by an equivalent specialist, and denied all benefits even though its own IME indicated an OD was present. The insurer also ignored the unusual strain rule. Penalty and attorney fees awarded.

ST. PAUL FIRE & MARINE INSURANCE CO. V. SUBSEQUENT INJURY FUND
WCC No. 9708-7816

Decision on Appeal [2/19/98] 1998 MTWCC 10
KEY WORDS: *39-71-906, *Equity, *Estoppel, *Statutory Interpretation, *Subsequent Injury Fund

After hearing, the Depart ment of Labor and Industry (DLI) denied St. Paul's request for a waiver of the 60-day period specified in section 39-71-906, MCA, for invoking Subsequent Injury Fund (SIF) provisions with respect to Steve Nave, who was injured in 1990 while working for Western Sugar Company, which St. Paul insured. After paying benefits, St. Paul learned that Nave was certified as vocationally disabled but had never notifie d Western or St. Paul of such fact. St. Paul requested the waiver so it could invoke SI F

provisions and transfer part of its liability to the SIF.

On appeal, the Court affirmed the DLI, holding that (1) equity does not favor St. Paul or the employer since St. Paul would not have reduced its premiums and the employe r therefore had no incentive to invoke SIF provis ions; (2) there is no provision in the statute for an extension; (3) there is no re quirement that claimant or the employer invoke the SIF provisions; and (4) there is no estoppel since the SIF made no representations and there is no proof of injury or reliance.

JETTA ARDESSON V. LEGION INSURANCE
WCC No. 9612-7668

Order Awarding Costs [2/19/98] 1998 MTWCC 9
KEY WORDS: *ARM 2.4.5.342, *Costs

Award of costs to petitioner, who prevailed at trial. Documented photocopies, postage, long distance charges and fax charges awarded pursuant to ARM 24.5.342. Travel expenses for witness awarded even though the witness did not testify due to an evidentiary ruling favoring petitioner. Costs for subpoena duces tecum served on respondent's claims examiner allowed even though respondent likely would have produced the materials without subpoena – the subpoena insured that there was no dispute or misunderstanding regarding the materials. Cost of transcript for first day of trial disallowed where no appeal and not essential to second day of trial.

Findings of Fact, Conclusions of Law and Judgment [1/15/98] 1998 MTWCC 2
KEY WORDS: *BENEFITS, *WAGES, *MEALS, *39-71-123, *PENALTY, *ATTORNEY FEES, *39-71-2907, *39-71-2203, *39-71-612, *MINTYALA, , *33-18-201(2)

Claimant is entitled to an increase in benefits based on free meals provided by her employer. Claimant was employed as a cook at a nursing home. Claimant was provided with one free meal a day. Other nursing home employees could purchase meals for $1.50 which the nursing home characterized as a "nominal" amount. Visitors could purchase meals for $3.00. Under the Workers' Compensation Act the meals must be valued at fair market value. Neither party provided good evidence of the value. The nursing home had no incentive to charge market price. The claimant urged restaurant prices but those prices reflect a broad menu unavailable at the nursing home and a restaurant atmosphere, including waitresses and waiters. The Court invoked the general rule that fact finders may use their general experience in deciding factual issues. Based on the Court's general experience, the meals are valued at $4.50. A penalty and attorney fees were award based on the insurers failure to timely investigate the claimant's request for an increase in benefits based on the meals and its failure to pay benefits once it conceded that the increase was due.

STEVEN KUYKENDALL V. LIBERTY NORTHWEST

WCC No. 9707-7794
Findings of Fact, Conclusions of Law and Judgment [2/19/97] 1998MTWCC 8

JACK J. O'BRIEN V. STATE FUND
WCC No. 9710-7854

Order Granting Motion for Protective Order [2/10/98] 1998 MTWCC 7
KEY WORDS: *§ 39-71-2914, *Deposition, *Discovery, *Penalty, *Protective Order, *Rule 11, *Sanctions, *Witnesses

Protective order issued prohibiting deposition of President of State Fund. The proposed deposition was for the purpose of a penalty and Rule 11 (§ 39-71-2914, MCA) sanctions. The penalty is unavailable in this case since the underlying controversy involves subrogation rights. The penalty may attach only to delayed benefits and there is no allegation that benefits were delayed. As to the matter of sanctions, those sanctions relate to the attorney. In this case the petitioner alleges that the State Fund's subrogation contention has no basis in law. The attorney signing the pleading asserting the subrogation interest certified that the assertion is "warranted by existing law or by a good faith argument for extension, modification or reversal of existing law." Whether the assertion indeed was or was not is a question of law. The deposition of the State Fund President has no relevance to the issue. Since the State Fund has now waived any subrogation right it might have, and the only issue remaining regards sanctions, all discovery is terminated.

Order Granting Partial Summary Judgment [2/10/98] 1998 MTWCC 6
KEY WORDS: *39-71-2907, *§ 39-71-2914, *Discovery, *Estoppel, *Judicial Estoppel, *Moot, *Penalty, *Rule 11, *Sanctions, *Summary Judgment, *Waiver

Partial summary judgment granted with respect to subrogation claim and petitioner's request for penalty. The State Fund has expressly waived any right to subrogation it may have in a medical malpractice settlement. That waiver is enforceable and the Fund is in any event judicially estopped from reasserting it at a later time, hence the issue is now moot and must be dismissed. The petitioner is not entitled to a penalty with respect to the initial assertion of a subrogation interest since the penalty statute applies only to delays in payments of benefits. Benefits were paid in this case and there is no allegation that they were delayed.

However, at this time the State Fund is not entitled to summary judgment on claimant's request that he be allowed to seek Rule 11 sanctions (§ 39-71-2914, MCA). Claimant alleges that the assertion of the subrogation interest in the State Fund's response to the petition has no basis in law and does not represent a "good faith argument for the extension, modification or reversal of existing law." If claimant is correct, then sanctions, including attorney fees may be awarded. Whether or not the subrogation assertion is legally supportable is a question of law for the Court,

however, the issue has not been adequately briefed. Further briefing is ordered. Since there are no remaining factual issues, no further discovery is permitted.

SAMUEL J. GRENZ V. FIRE & CASUALTY OF CONNECTICUT
WCC NO. 9701-7693

AFFIRMED - Non-Citable 2/18/98

Order On Appeal [7/7/97]
KEY WORDS: *RES JUDICATA, *CLAIM, *INJUNCTION.

Department of Labor decision dismissing the latest of Grenz's claims on res judicata grounds is reversed where the specific issue raised by Grenz -- whether his 1984 injury claim also constituted a claim for occupational disease benefits -- has never been addressed by the Department or a Court. Remanded for consideration of other defenses, including whether the 1984 claim sets forth sufficient information to state a claim under the ODA. Also remanded for reconsideration of the Department's order prohibiting further filings.

Grenz v. Fire & Casualty of Conn.,_____ Mont. _____ , _____ P.2d _____, 53 St. Rep. 898 (1996)
AFFIRMED 9/17/96.
KEY WORDS: *STATUTE OF LIMITATIONS, *OCCUPATIONAL DISEASE, *NOTICE, *39-72-403 (1985), *SUBSTANTIAL EVIDENCE

Supreme Court, agreeing with WCC and DLI hearing examiner, determines that Grenz knew or should have known prior to 1988 that his total disability was caused by an occupational disease. Refuses to consider argument which is made for the first time on appeal.

Order Denying Motion for Trial/Reconsideration [9/13/95]
KEY WORDS: NEW TRIAL, RECONSIDERATION.

Motion for reconsideration/new trial denied. Grenz does not pursue request to present additional evidence, ARM 2.52.350(4). His presents no reasonable excuse for his failure to present the evidence he now wants to submit. Additional grounds asserted were never briefed or raised and will not be considered now

Decision on Appeal [8/24/95]
KEY WORDS: *OCCUPATIONAL DISEASE, *STATUTE OF LIMITATIONS.

Decision of Department of Labor denying claimant's occupational disease claim as time-barred affirmed where more than two years prior to filing his claim the claimant should have known that he was suffering from an occupational disease.

ELIZABETH M. KUZARA V. STATE FUND
WCC No. 9502-7246R1

Order Denying Reconsideration [2/2/98] **1998 MTWCC 5**
KEY WORDS: *Credibility, *Reconsideration

The State Fund requested reconsideration of the Court's (Judge Russell C. Fagg substituting) findings of fact respecting notice. The request was rejected, the Court noting that the greater number of witnesses does not necessarily establish a particular fact. Claimant was a credible witness and conflicts of testimony were resolved in her favor.

Findings of Fact, Conclusions of Law and Judgment [11/26/97]
KEY WORDS: *Injury, *Notice

Proceeding upon remand from the Supreme Court. Judge Russell C. Fagg, Billings, presided over the matter and found as matters of fact that claimant had given timely notice of her industrial injury to her employer and that she suffered an industrial back injury.

JIM DAENZER V. STATE FUND/CURTIS BARTELL
WCC No. 9604-7534

Findings of Fact, Conclusions of Law and Judgment [1/29/98] **1998 MTWCC 4**
KEY WORDS: *Indemnity, *Accident, *Injury, *39-71-405, *39-71-119 (1993), *39-71-407 (1993).

Petition by uninsured employer (Daenzer) against claimant (Bartell) and an insurer (State Fund) providing coverage pursuant to section 39-71-405, which imposes liability on the prime contractor's insurer where its subcontractor (Daenzer) is uninsured. Uninsured employer disputed acceptance of the claim and alleged that claimant was not injured on the job and was in fact injured in a bar fight. After trial, the Court found that claimant was in fact injured on the job and ordered the uninsured employer to reimburse the insurer for compensation and medical benefits paid to date and for any medical benefits reasonably incurred in the future.

Order Denying Motion to Dismiss [7/16/96]
KEY WORDS: *JURISDICTION, *39-71-415, *39-71-405, **HUNT*.

Workers' Compensation Court has jurisdiction to consider employer's claim that a worker's injury did not occur in the scope and course of employment and was fraudulent, at least where the employer is uninsured and the claim is accepted by an upstream insurer pursuant to 39-71-405.

THEDA BEA BOULDIN V. LIBERTY NORTHWEST INSURANCE CORPORATION

WCC No. 9604-7536

Order Awarding Costs [1/22/97] **1998 MTWCC 3**
KEY WORDS: *COSTS, *LOSS TIME FROM WORK

There are no provisions in the WC or OD acts, nor in the rules of the WCC, which provide for "loss time from work" as a cost item.

Order Regarding Applicable Law [3/4/97]
KEY WORDS: *OCCUPATIONAL DISEASE, *APPLICABLE LAW, *LAW IN EFFECT, *39-72-403

Where occupational dise ase claim filed prior to claimant's retirement from the workforce, the statute in effect on the date of the claim governs the claimant's entitlement to benefits. *Grenz, Lockwood,* and *Gidley* distinguished. Underlying principle announced in *Gidley* followed.

PHILLIP R. JENSEN V. STATE FUND
WCC No. 9710-7853

Order Denying Motion To Dismiss [1/12/98] **1998 MTWCC 1**
KEY WORDS: *INDEPENDENT CONTRACTOR, *24.5.316(3) *ISSUES OF LAW

Employer alleges that the claimant, Phillip R. Jensen, was not an employee, but rather an independent contractor and further that the claimant's fall was premeditated and intentional. Employer's brief is not supported by "appropriate supporting documents and affidavits." (ARM 24.5.316(3).) Petitioner disputes these contentions. These are issues which must be resolved through a trial.

RAYMOND KUNTZ V. NATIONWIDE MUTUAL FIRE INS. CO.
WCC No. 9508-7378

AFFIRMED 1/13/98

KEY WORDS: *PERMANENT PARTIAL DISABILITY, *39-71-705 (1985), *CAUSATION, *CREDIBILITY, *AGGRAVATION, *TREATING PHYSICIAN..

Supreme Court finds that WCC had substantial credible evidence to support its conclusion that claimant does not have a permanent partial disability due to a 1987 low back strain which he contended permanently and materially worsened his pre-existing low back condition. (Claimant suffered many injuries) SC relied on credibility conclusions of WCC Judge and it also upheld a conclusion based on the results of an IME rather than the treating physician. (*Kloepfer,* 276 Mont. at 497-98, 916 P.2d at 1311.)

Findings of Fact, Conclusions of Law and Judgment [11/19/96]
KEY WORDS: *PERMANENT PARTIAL DISABILITY, *39-71-705 (1985), *CAUSATION, *CREDIBILITY, *AGGRAVATION.

Permanent partial disability benefits denied where claimant failed to persuade the Court that a 1987 low back strain permanently and materially worsened his pre-existing low back condition.

KATHY M. FITCH v. LIBERTY MUTUAL FIRE INSURANCE CO.
WCC No. 9708-7814

Court Memo Concerning Motion for Protective Order [12/30/97]
KEY WORDS: EVIDENCE, INTIMIDATION, PRIVACY, PROOF, PROTECTIVE ORDER, RIGHT OF PRIVACY, STALKING, SURVEILLANCE, TAMPERING, WITNESSES.

Motion for protective order requesting the Court to prohibit the insurer's attorney from interviewing witnesses and to suppress surveillance films is without merit and denied. Allegation that insurer's attorney "intimidated" witnesses is unsupported, intemperate and scandalous. Allegations of trespass, stalking, invasion of privacy, interference with business, and tampering with video tapes were wholly unsupported by any facts presented to the Court.

REGINA KUHRT v. STATE FUND
WCC No. 9707-7788

APPEALED 1/12/98
Decision and Order [12/30/97]
KEY WORDS: COMING AND GOING, COURSE AND SCOPE, *HEATH V. MONT. MUN. INS. AUTHORITY*, TRAVELING

Claim for compensation denied where claimant still traveling to work when she slipped and fell while exiting her vehicle which was parked on a public street. Claimant was not paid for her travel and was not required to park in any particular place. She fails to meet any of the exceptions to the general rule that there is no coverage coming to and going from work. *Heath v. Mont. Mun. Ins. Authority* followed.

STEPHEN G. SMITH v. LIBERTY MUTUAL FIRE INSURANCE CO.
WCC No. 9612-7677

APPEALED 12/18/97
Findings of Fact, Conclusions of Law and Judgment [11/19/97]
KEY WORDS: *39-71-401(2)(k), *39-71-120 (1995), *INDEPENDENT CONTRACTOR, *NEWSPAPER CARRIERS, *WRITTEN ACKNOWLEDGMENT

Section 39-71-401(2)(k), MCA (1995), provides that newspaper carriers who make a written acknowledgment that they are not covered under the Workers' Compensation Act are not subject to such coverage. In this case a written contract containing a newspaper carrier's express acknowledgement that he was not covered by workers' comensation had expired by its own terms but the newspaper carrier continued delivering papers at the request of the publisher. The newspaper carrier was injured while delivering papers. The Court held that since no written acknowledgment of non-coverage existed for the time period when the accident occurred, the workers' compensation exclusion for newpaper carriers did not apply. The carrier also did not meet the definition of independent contractor since he did not have a contractor's expemption as required by section 39-71-120, MCA (1995). (The requirement of an exemption to qualify as an independent contractor was repealed in 1997.) He was therefore an employee and the publisher's insurer is liable for his industrial accident.

FRANK JONES v. RELIANCE NATIONAL INDEMNITY CO.
WCC No. 9709-7825

Order Denying Motion For Partial Summary Judgment [12/17/97]

KEY WORDS: *SUMMARY JUDGMENT, *PERMANENT PARTIAL DISABILITY, *39-71-116 (1991), *39-71-703 (1991), **MOGUS.*

Claimant, who was injured in the fall of 1991, seeks permanent partial disability benefits upon reaching age 65 even though he was receiving permanent total disability benefits during the year prior to reaching that age. Citing this Court's recent decision in *Mogus*, which held that a permanently totally disabled claimant is not entitled to permanent partial disability benefits, the insurer moved for partial summary judgment. The motion is denied since the only fact in evidence is that claimant was receiving permanent total disability benefits during the prior year. Since the insurer could have unilaterally paid those benefits, and there is no further admissible evidence concerning the matter, the payment and receipt of the benefits are not conclusive as to the nature of claimant's disability.

STEVEN K. BURGLUND V. LIBERTY MUTUAL NW INS.
WCC No. 9507-7342

AFFIRMED 12/16/97

KEY WORDS: *OCCUPATIONAL DISEASE, **CAEKAERT,* *BURDEN OF PROOF, *AGGRAVATION, *NATURAL PROGRESSION .

Insurer failed to carry its burden of proving that claimant suffered from a subsequent occupational disease which materially or substantially worsened a preexisting condition which was the result of a prior industrial accident. Medical evidence supported WCC decision that the claimant's condition was caused by a "natural progression" of his 1984 injury.

Findings of Fact Conclusions of Law and Judgment [8/29/96]

KEY WORDS: *OCCUPATIONAL DISEASE, *SUBSEQUENT DISEASE, **CAEKAERT*, **LIBERTY NORTHWEST V. CHAMPION INTERN'L*, *BURDEN OF PROOF, *AGGRAVATION.

Insurer failed to carry its burden of proving that claimant suffered from a subsequent occupational disease which materially or substantially worsened a preexisting condition which was the result of a prior industrial accident. Liability for original injury continues. Decision discusses prior cases and distinctions among them.

DAVID R. HOLCOMB v. MONTANA MUNICIPAL INSURANCE AUTHORITY & SUBSEQUENT INJURY FUND
WCC No. 9701-7685

Decision and Order on Appeal [12/2/97]

KEY WORDS: *39-71-703 (1987),*39-71-910 (REPEALED), *JUDICIAL REVIEW, *JURISDICTION, *MEDICAL EVIDENCE, *PERMANENT PARTIAL DISABILITY BENEFITS, *SUBSEQUENT INJURY FUND, *SUBSTANTIAL EVIDENCE, *WAGE LOSS BENEFITS.

Decision of Department of Labor and Industry hearing officer denying wage-loss benefits in a Subsequent Injury Fund case affirmed where it is supported by substantial, credible evidence, including a medical release to full duty and the fact that claimant performed his time-of-injury job for several years after he reached MMI and left the job only because his wife got a better job in a different city. Hearing examiner had good reason to reject the medical opinions of a doctor hired by claimant for the purpose of testifying where the doctor formulated his opinions without having many of the medical records, based his opinion on a stale FCE done prior to a second surgery, and erroneously believed that claimant had received ongoing treatment. The physician was also not a surgeon, is not board certified in any specialty, and did not have hospital privileges.

DENNIS VEZINA v. STATE FUND
WCC No. 9704-7743

Findings of Fact, Conclusions of Law and Judgment [11/21/97]

KEY WORDS: *CREDIBILITY

Claimant, who alleged that he suffered an industrial injury, not credible. Held: no industrial accident occurred.

BETTY M. TUCKER V. STATE FUND

WCC No. 9706-7764

Decision and Judgment [11/14/97]
KEY WORDS: *LUMP SUM, *MEDICAL BENEFITS, *SETTLEMENT.

Petition for approval of a lump-sum agreement reached between claimant and State Fund concerning future medical benefits granted where the evidence presented to the Court indicated that there exists a dispute over future medical services and the amount to be paid for claimant in consideration of closure of her medical claims is reasonable.

STEPHEN T. GARCIA V. DLI/ERD/JULIE MANIACI
WCC No. 9607-7768

Order Amending Order On Appeal [11/7/97]
KEY WORDS: *INSURER, *39-71-519, *39-71-505.

Order on appeal amended to find that the UEF is an insurer within the meaning of the Workers' Compensation Act. The amendment is based on section 39-71-505, MCA, which was overlooked by the parties and by the Court in its original decision. That section provides that "all appropriate provisions" of the WCA apply to the UEF just as if it were an insurer. Thus, it must be treated as an insurer for settlement purposes. However, the result of the original decision is unchanged since section 39-71-519, MCA, expressly authorizes settlements between uninsured employers and injured workers with or without the UEF's participation.

Order on Appeal [10/23/97]
KEY WORDS: *39-71-116, *39-71-519, *39-71-741, *INSURER, *JUDICIAL REVIEW, *PARTIES TO SETTLEMENT, *RECISION, *SETTLEMENT, *UNINSURED EMPLOYERS.

The Uninsured Employers' Fund (UEF) is not a necessary party to a settlement agreement entered into between the claimant and the uninsured employer on a disputed liability settlement which settles claims against the uninsured employer. The agreement does not affect the UEF's rights against the uninsured employer. DLI refusal to approve the agreement because the UEF was not a party to it is reversed. However, the DLI did not address the statutory criteria applicable to the settlement, to wit: whether liability was reasonably disputed. The matter is therefore remanded to the DLI for further review. Claimant's attempt to withdraw from the agreement is ineffective since the agreement constitutes a binding contract with Department approval being a condition precedent to enforcing the agreement. The employer's last minute attempt to withdraw the appeal after the matter was submitted and the decision written is too late. The parties may still enter into an agreement to rescind the settlement.

RONALD MOGUS V. RELIANCE NATIONAL INDEMNITY INS. CO.
WCC No. 9705-7749

APPEALED

Order and Judgment [10/24/97]

KEY WORDS: *39-71-116, *39-71-703, *PERMANENT PARTIAL DISABILITY, **RUSSETTE V. CHIPPEWA*, **WILLIAMS V. PLUM CREEK.*

Permanently totally disabled worker not entitled to permanent partial disability benefits upon reaching age 65 because he does not meet the definition of permanent partial disability in that he is not able to return to work in some capacity. *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 874 P.2d 1217 (1994). Distinguished. *Williams v. Plum Creek Timber Co.*, 270 Mont. 209, 214, 891 P.2d 502, 504 (1995). Followed.

R. ZIMMERMAN, INOCO, INC., et al V. UEF/STATE FUND

WCC No. 9611-7648

Order on Appeal [10/23/97]

KEY WORDS: *39-71-504, *CORPORATIONS, *EVIDENCE, SUBSTANTIAL EVIDENCE, *UNINSURED EMPLOYER, *UNINSURED EMPLOYER PENALTY.

Decision of Department of Labor and Industry imposing a penalty on an uninsured employer affirmed where there is substantial evidence supporting the hearing examiner's determination that the employer controlled its truck drivers from Montana and the drivers were Montana residents. Penalty may be imposed only on the corporate employer lacking evidence which would permit piercing the corporate veil. Argument that another insured company operated by the employer's principal shareholder was really same company as the corporation rejected where the evidence showed that the other company was insured as a sole proprietorship, did not employ truck drivers, and was otherwise separate from the employing corporation. Record and evidence below criticized.

DWIGHT "LARRY" BOULDIN V. UEF

WCC No. 9704-7742

Decision and Judgment [10/22/97]

KEY WORDS: *39-71-120, *39-71-401 (1995), *INDEPENDENT CONTRACTOR, *INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE.

An exemption certificate issued by the Department of Labor to an applicant representing himself or herself as an independent contractor is conclusive as to independent contractor status, § 39-71-401(3)(c)(1995), and cannot thereafter contend that he or she was an employee of another who has relied on the exemption certificate. Petition for workers' compensation benefits dismissed.

GERMAINE M. BRATCHER V. LIBERTY NORTHWEST INSURANCE CORP.

WCC No. 9704-7741

APPEALED
Findings of Fact, Conclusions of Law and Order [10/21/97]
KEY WORDS: *39-71-703 (1995), *PERMANENT PARTIAL DISABILITY, *WAGE LOSS.

Claimant not entitled wage-loss benefits where preponderance of evidence demonstrates that she is qualified to earn as much or more than she was earning at her time-of-injury job.

BRETT BRINEY V. PACIFIC EMPLOYERS INSURANCE CO.
WCC No. 9410-7160

Order Denying Penalty and Setting Schedule for Awarding Attorney Fees [10/17/97]
KEY WORDS: **LIBERTY NORTHWEST INS. CORP. V. STIMSON LUMBER CO.,* *PENALTY, *REASONABLENESS.

Determination after remand that penalty is not warranted. Although the Supreme Court found that the insurer's occupational disease theory (repetitive) was not supported by substantial evidence and therefore did not relieve it from liability with respect to an old injury, the facts of this case are not so different from those adduced in Liberty Northwest Ins. Corp. v. Stimson Lumber Co. (October 10, 1997), a case in which the Supreme Court held that a subsequent occupational disease did relieve the insurer for an old injury from liability. Therefore, the position taken by the insurer was not outside the bounds of reasonable debate and not unreasonable. The amount of attorney fees are still to be determined.

MICHAEL RAGATZ V. UEF and BEVERLY LUNCEFORD
WCC No. 9707-7779

Order Imposing Sanctions and Compelling Discovery [10/16/97]
KEY WORDS: *SANCTIONS, *DISCOVERY, *ARM 24.5.326, *ARM 24.5.303, *ARM 24.5.323, *ARM 24.5.324.

Sanctions imposed upon claimant's counsel for failure to provide timely answers to interrogatories and requests for productions. While a subsequent affidavit concerning claimant's inability to answer the discovery requests provides good cause for an extension of time, no request for an extension was ever made and claimant's counsel ignored a follow up letter requesting responses, thus putting opposing counsel and the Court to unnecessary work. $300 awarded in attorney fees.

LIBERTY NORTHWEST INS./ BRAND S LUMBER v. STATE FUND

WCC No. 9708-7818

Order Dismissing Petition [10/1/97]
KEY WORDS: *JURISDICTION, *TORTS.

Workers' Compensation Court lacks jurisdiction over cause of action brought by one insurer against another based on representations that it would cover an employer and that it would notify the first insurer if coverage lapsed. The petitioning insurer seeks to recover benefits it has paid to an injured worker. However, its petition alleges that the respondent insurer did not provide coverage for the worker, thus the respondent is not liable to pay benefits to the worker. The action therefore sounds in tort and seeks damages, albeit damages based on the benefits the petitioning insurer has paid to the injured worker. The Workers' Compensation Court does not have jurisdiction over tort actions. Dismissed.

TIMOTHY LEWIS V. STATE FUND
WCC No. 9707-7797

Orders denying Motion To Dismiss, Limiting Issues, And For A More Definite Statement [9/25/97]
KEY WORDS: *MOTION TO DISMISS, *MEDIATION, *MORE DEFINITE STATEMENT.

Motion to dismiss for failure to mediate denied where claimant is making no claim with respect to the injury not mediated and the other injuries he is pursuing were either mediated or antedated the mediation requirement. However, because the petition fails to advise the court as to the specific benefits claimant is seeking, he is ordered to file an amended petition stating with particularity the nature of his disability and the specific benefits he is seeking.

LUMBERMENS MUTUAL CASUALTY CO. V. CHARLES MARES
WCC NO. 9707-7782

Order Dismissing Petition [9/19/97]
KEY WORDS: *39-71-2401(1), *39-71-2408(1), *39-71-2410, *39-71-2905, *DECLARATORY JUDGMENT, *MEDIATION, *PREEMPTIVE STRIKES.

The insurer in this case petitioned the Court for a determination that claimant's "current medical and psychological conditions are not related to" an industrial injury for which the insurer accepted liability. It further asks that the Court determine that its liability for any further benefits has ended. Finally, it sought reimbursement for medical benefits paid under a reservation of rights. On motion of the claimant, the petition is **dismissed.** The insurer cannot force claimant to litigate his possible future entitlement to benefits -- he may never pursue further benefits. *Champion International Corp. v. Brennan,* WCC No. 9504-

7269 (June 13, 1995). As to the claim for reimbursement, the insurer failed to mediate the issue and the Court has no jurisdiction over it until mediated.

DENNIS DESJARDINS V. LIBERTY NORTHWEST INS.
WCC No. 9703-7728

Findings Of Fact, Conclusions Of Law And Judgment [9/12/97]
KEY WORDS: * PTD, *PAIN.

Court finds that claimant, who has had 3 back surgeries and suffers constant pain which increases in proportion to his activities, is presently permanently totally disabled. Medical and lay evidence substantiated his reported level of pain. While there was conflicting medical testimony concerning his ability to perform a handful of sedentary type jobs, the Court was persuaded that claimant is able to engage in productive activities only 2 to 3 hours a day, and is incapable of performing regular employment. Weight loss, changes in medications, and an ergonomic workplace MAY enable claimant to increase his level of activities and render him employable but the Court was not convinced that those changes WILL do so. The Court expressly encouraged claimant to pursue the recommended changes. No attorney fees or penalty since the insurer mustered credible evidence which would support a contrary result to the one the Court reached.

BETTY M. TUCKER V. STATE FUND
WCC NO. 9706-7764

Order Denying Motion to Join Department or Dismiss Petition [9/5/97]
KEY WORDS: *JOINDER, *PARTIES, *SETTLEMENT PETITIONS (AGREEMENTS).

Motion to join Department as a necessary party, or in the alternative to dismiss, denied. This case involves a petition asking the Court to overturn the Department's denial of a written settlement agreement/petition between herself and the State Fund. The Department is in no different position in this type of proceeding than one for judicial review. The relief requested by claimant -- performance of the settlement agreement -- would be carried out by State Fund, which would pay the settlement if claimant prevails.

ELVINA MOLDENHAUER V. LUMBERMENS MUTUAL
WCC NO. 9609-7614

Order Denying Petitioner's Alternative Motions for Rehearing or for Reconsideration [9/4/97]
KEY WORDS: *39-71-703(3)(d) (1993), *EXPERT TESTIMONY, *LABORING CAPACITY, *NEW TRIAL, *PRETRIAL ORDER, *RECONSIDERATION.

Claimant's motions for rehearing or reconsideration denied. The definition of heavy labor applies

to both pre- and post-injury activities. While expert opinions concerning physical restrictions should not be arbitrarily rejected, they are not binding on the Court. Here the evidence showed that claimant in fact continued to lift in excess of 50 pounds. There was no evidence that she found it difficult or that she suffered as a result. Lacking such evidence, her actual activities are the best measure of her labor capacity.

Claimant points out that the insurer never argued she can perform heavy lifting post-injury. Indeed the insurer's theory of the case was that her job required her to do only light lifting. Nonetheless, the insurer denied that claimant had suffered a loss of laboring capacity and that was the issue submitted to the Court for decision.

Findings of Fact, Conclusions of Law and Judgment [6/23/97]
KEY WORDS: *39-71-703 (1991), *OCCASIONAL, *STATUTORY INTERPRETATION, *TECHNICAL TERMS, *VOCATIONAL TESTIMONY.

Request for 15% labor factor denied where claimant lifted 50 pounds both before and after her injury. Given the vocational testimony in this case, any job involving lifting of objects more than 50 pounds is deemed heavy, but contrary result reached in the Church case based on different testimony. Although claimant in this case could not lift one of the items previously lifted, her lifting of any items greater than 50 pounds post-injury requires classification of her post-injury job as heavy, thus there is change in her laboring capacity.

COLLEEN CONNERY V. LIBERTY NORTHWEST INSURANCE CORPORATION
WCC NO. 9702-7703

APPEALED
Decision and Judgment [9/4/97]
KEY WORDS: *39-71-416 (1995), *CONSTITUTIONALITY, *FULL REDRESS, *SUBROGATION.

Statute providing that an insurer may reduce or offset a claimant's benefits by up to 30% should she recover damages from a third-party tortfeasor is unconstitutional as it violates the full redress clause. Claimant, who settled with the third party who injured her, is entitled to full benefits without reduction.

C. LONEY CONCRETE CONSTRUCTION v. ERD/UEF
WCC No. 9607-7578
APPEALED
Order on Appeal [8/15/97]
KEY WORDS: *TEMPORARY WORKER, *39-71-116(24) (1991), *39-71-117(2) (1991), *39-71-507, *JURISDICTION.

After remand by this Court, the DLI again found that all persons working for Loney were Loney

employees and not temporary workers. As to some of those persons, the finding was based on positive, substantial evidence. As to others, the hearing examiner improperly placed the burden of persuasion on Loney. Those others all worked for short periods and had not previously been employed by Loney. The evidence failed to prove that they were not hired for specific, short term jobs, i.e, that they were NOT temporary workers. Remanded for entry of an order so finding. Loney's challenge to jurisdiction without merit.

JEANNE WARD V. PLUM CREEK MANUFACTURING
WCC NO. 9701-7692

Order Denying Respondents Motion For Summary Ruling [8/13/97]
KEY WORDS: *MEDIATION, *SETTLEMENT, *JURISDICTION, *LUMP SUM, *39-71-2401 (1993), *39-71-741(2) (1993).

Challenge to the sufficiency of a claimant's demand prior to mediation (39-71-2401(4)(a)) must be raised with mediator in the first instance. Failure to do so preclude's insurer from challenging mediation procedure in WCC.

1993 lump-sum statute applicable to lump summing of permanent partial disability benefits does not require justification. The only ground for disapproving lump sum is inadequacy of the amount. 39-71-741(2), MCA (1993).

Therefore, Insurer's motion to dismiss for inadequate justification is **denied**.

PENNY STEVENS V. NATIONAL UNION FIRE INS. CO. OF PITTSBURGH
WCC No. 9703-7733

Partial Summary Judgment and Findings of Fact, Conclusions of Law and Judgment [7/17/97]
KEY WORDS: *39-71-611 (1989), *39-71-612 (1989), *39-71-2907 (1989), *ATTORNEY FEES, *COSTS, *PENALTY, *REASONABLENESS

Insurer's Motion for Partial Summary Judgment granted. Attorney fees and costs denied as a matter of law. Insurer accepted liability for medical costs after mediation but before claimant filed petition with this Court. Claim not adjudged compensable by the WCC. Penalty awarded. Penalty award available to claimant from the moment the insurer's delay in payment becomes unreasonable. Insurer unreasonably delayed payment of medical expenses after obtaining IME. Upon receipt of the IME, the insurer did not have a single medical opinion disputing the relationship between claimant's condition and the industrial injury.

ROBERT CHEETHAM, JR. V. LIBERTY NORTHWEST INS. CORP.
WCC No. 9612-7675

Order Regarding Medical Payments [7/16/97]
KEY WORDS: *ATTORNEY FEES, *MEDICAL BENEFITS

Order awarding payment of 25% of the benefits due claimant, including medical benefits, be paid directly to claimant's attorney as sole payee. Judgment lien attaches to medical benefits which were awarded by this Court. The fee agreement in this case, which was approved by the Department, specifically provides for an attorney fee with respect to medical benefits when the insurer has denied all liability, including liability for medical and hospital benefits.

LARRY B. GOOD V. STATE FUND
WCC No. 9609-7617

Findings of Fact, Conclusions of Law and Judgment [7/16/97]
KEY WORDS: *39-71-603(1995), *NOTICE, *SUPERVISOR

Claimant and his witness were not credible and failed to persuade the Court that claimant timely reported the injury to the employer. Alleged report of the industrial injury to a co-employee, a receptionist, does not satisfy the requirement that claimant report the injury to someone with supervisory status or authority. Moreover, the Court found that neither claimant nor his witness reported the alleged injury to the receptionist/co-employee.

LINDIA GROOMS v. PONDEROSA INN
WCC No. 9603-7523

***Grooms v. Ponderosa Inn*, __ Mont. ___, ___ P.2d ___, __ St. Rep. __ (1997). AFFIRMED 7/15/97**
KEY WORDS: *OCCUPATIONAL DISEASE ACT, *OCCUPATIONAL DISEASE MEDICAL PANEL, *TREATING PHYSICIAN, *CONSTITUTIONAL LAW, *DUE PROCESS, *EQUAL PROTECTION, *RIGHT TO HEARING,*LEGAL REDRESS.

Medical panel procedures under the Occupational Disease Act, including requirement that party asking for a second examination pay for it, are constitutional. All aspects of the WCC decision affirmed.

Order and Judgment [7/16/96]
KEY WORDS: *OCCUPATIONAL DISEASE ACT, *OCCUPATIONAL DISEASE MEDICAL PANEL, *MEDICAL PANEL, *TREATING PHYSICIAN, *CONSTITUTIONAL LAW, *DUE PROCESS, *EQUAL PROTECTION, *RIGHT TO HEARING.

Medical panel procedures under the Occupational Disease Act, including requirement that party asking for a second examination pay for it, are not unconstitutional. Claimant could have requested a hearing without a second exam and was free to present other medical evidence. A panel physician is not a treating physician.

BRETT BRINEY v. STAUFFER CHEMICAL
WCC No. 9410-7160

_____ Mont. _____ , _____ P.2d _____, _____ St.Rep. _____ (1997). Reversed and Remanded, 6/24/97
KEY WORDS: *BURDEN OF PROOF, *PENALTY, **HOLTEN*, **WALKER*, *PROXIMATE CAUSE, *AGGRAVATION, *MEDICAL OPINIONS

Supreme Court reviews the medical depositions and finds that the "undisputed, substantial evidence establishes that Briney's current physical impairment and disability is primarily attributable to the injury . . . on May 24, 1981." Insurer failed to prove that some intervening act was cause of claimant's disability, per *Walker v UPS (1993)*.

Findings of Fact, Conclusions of Law and Judgment [9/18/95]
KEY WORDS: *PROXIMATE CAUSE, *AGGRAVATION, *MEDICAL OPINIONS

Claimant, who suffered a series of back pain producing incidents over a period of 12 years, failed to prove that his current, disabling low-back condition was proximately caused by a 1981 injury. Medical testimony established that his condition was more likely the cumulative consequence of a series of injuries and that he probably could have continued working absent the additional injuries. Permanent partial disability benefits denied.

CATHERINE E. SATTERLEE V. LUMBERMEN'S MUTUAL CASUALTY COMPANY
WCC No. 9502-7230

Order Denying Motion for Order Nunc Pro Tunc [6/17/97]
KEY WORDS: *REMAND

Motion to amend judgment on remand because it awards permanent total disability benefits rather than "total disability benefits" is **denied**. Although Supreme Court directed entry of judgment for total disability benefits, its instructions must be read in the context of its decision and the issue presented. The only benefits requested were **permanent** total benefits and those are the benefits that must be awarded.

J.B. BAUGUS V. STATE FUND
WCC No. 9601-7474

Order Governing Production of Documentary Evidence and Depositions [6/13/97]
KEY WORDS: *DEPOSITIONS, *DISCOVERY, *FIFTH AMENDMENT, *PRODUCTION *SEARCH AND SEIZURE, *SELF-INCRIMINATION, *SUPPRESSION

Claimant, who is criminally charged with defrauding the State Fund of workers' compensation benefits, is seeking a determination in the WCC of his entitlement to the benefits in question. Meanwhile, the criminal action is stayed. He objects to the use in this proceeding of seized documents suppressed in the criminal case and also indicates his intent to invoke his Fifth Amendment right in response to (1) questions relating to another criminal action charging him with possession of stolen vehicles, and (2) questions not dealing with his income over the years. This Court previously ordered the seized documents suppressed. However, at hearing, claimant's counsel agreed that the documents might be used for impeachment purposes and agreed to cooperate in producing them. Counsel also agreed that depositions of claimant and his wife may proceed and that if claimant or his wife object to specific evidence or invoke their Fifth Amendment rights in response to specific questions, then counsel will contact the Court for rulings on the specific objections and invocations. An Order issued directing production of the documents, that the depositions proceed, and reserving ruling as to other issues.

Order Denying Motion to Compel Discovery [4/23/97]

KEY WORDS: *FRAUD, *EVIDENCE, *SUPPRESSION OF EVIDENCE, *CRIMINAL PROSECUTION.

Where a district court stayed a criminal fraud prosecution against a claimant so that the Workers' Compensation Court can determine the claimant's entitlement to benefits, and where the district court stated that such determination is a prerequisite to determining claimant's criminal guilt or innocence, the WCC proceeding is deemed ancillary to the criminal case and evidence suppressed by the district court is also suppressed by the WCC.

ROBERT CHEETHAM, JR. V. LIBERTY NORTHWEST INSURANCE CORPORATION
WCC No. 9612-7675

Findings of Fact, Conclusions of Law and Judgment [6/11/97]

KEY WORDS: *39-71-119(5)(1995), *AORTIC DISSECTION, *APPORTIONMENT, *_GAUMER V. MONTANA DEPT. OF HIGHWAYS_, *PRIMARY CAUSE.

Claimant entitled to benefits on account of an aortic dissection that was precipitated by 20 to 30 minutes of strenuous pulling on an engine starter rope. The activity raised his blood pressure and precipitated the event. Although he suffered from a preexisting weakness of the aortic wall, two of three physicians opined that the job-related strain contributed 51% to the condition, thereby satisfying the requirement under section 39-71-119(5), MCA (1995), that to a reasonable degree of medical certainty, the work-related factor be the primary cause of the condition. "Conditions" as used in the statute means overall condition. No attorney fees awarded since the matter was reasonably debatable.

RONNI LEWIS V. LIBERTY NORTHWEST INSURANCE CORPORATION
WCC No. 9606-7566

Findings of Fact, Conclusions of Law and Judgment [6/4/97]
KEY WORDS: *CREDIBILITY

Court holds that claimant did not injure her wrist in a work-related accident. Credibility issues resolved against claimant.

KEN M. McLAUGHLIN V. ANR FREIGHT SYSTEMS
WCC No. 9507-7343 AND

ANR FREIGHT SYSTEMS V. KEN M. McLAUGHLIN
WCC No. 9603-7517

Findings of Fact, Conclusions of Law and Judgment [6/4/97]
KEY WORDS: *ATTORNEY FEES, *LOSS OF EARNING CAPACITY, *PERMANENT TOTAL DISABILITY, *REASONABLENESS, *PENALTY, *SCHEDULED INJURY, *SUBROGATION, *VOCATIONAL EVIDENCE.

Claimant entitled to permanent partial disability for loss of earning capacity due to injury to wrist. Although claimant returned to his time-of-injury job for a couple of years, he testified persuasively that his injury caused him continued pain and interfered with his ability to do his job and compromised his safety and that he was unable to continue his job as a result. Although no physician specifically restricted him, medical records documented a substantial wrist impairment, loss of range of motion, and pain. Post-injury earning capacity best demonstrated by the subsequent jobs claimant obtained since he did a diligent search. Benefits limited to 280 weeks for loss of arm at shoulder since the injury effected his use of his entire arm. Claimant failed to establish that back and knee condition were affected by anything other than a natural progression of preexisting conditions. Subrogation denied as claimant's actual damages far exceed his actual recoveries. Attorney fees and penalty denied since the insurer's further liability was reasonably debatable.

VELLDA BATES V. RANGER INSURANCE COMPANY
WCC No. 9703-7718

Partial Findings of Fact, Conclusions of Law and Partial Judgment [6/3/97]
KEY WORDS: *WAGES, *39-71-116(2) (1981).

Old law case. Partial judgment entered finding that claimant is not entitled to increase in permanent total disability rate. She argued that overtime hours worked during the four two week pay periods reported on the employer's first report should be considered and averaged. However, Coles requires that to be included the overtime hours be consistent and regular. In this case they were not and the evidence failed to establish any future expectation of any particular amount of overtime hours, indeed during the last two week period claimant worked no overtime.

GERALD MADILL V. STATE FUND
WCC No. 9506-7320

Judgment Awarding Attorney Fees [5/28/97] **DWP 9/24/97**
KEY WORDS: *ATTORNEY FEES, *REMAND.

Attorney fees and costs awarded pursuant to Supreme Court remand. Petiti oner's request for attorney fee s with respect to his efforts to secure attorney fees denied since they are not within the scope of the Supreme Court decision and are in any event not authorized by statute, 37-71-612 (1979).

Madill v. State Compensation Insurance Fund, _____ Mont. _____ , _____ P.2d _____, _____ St. Rep. _____ (1996), January 2, 1997. **REVERSED AND REMANDED.**
Treiwieler, Dissent - Gray

KEY WORDS: *ATTORNEY FEES, *39-71-612(1979)

Supreme Court determines that there is an entitlement to attorney fees per §39-71-612(1979) when the parties reach a settlement of disputes even though the dispute was not resolved by the Workers' Compensation Court. Further, *Lasar, Komeotis* and *Field* are overruled to the extent that they "have ignored the plain language in § 39-71-612, MCA (1979), which provides for an award of attorney fees and costs where there is a controversy regarding the amount of compensation due, and where the "settlement" is greater than the amount paid or tendered. . . ."

Order on Appeal [1/11/96]
KEY WORDS: *ATTORNEY FEES.

Appeal from DLI. Held: Claimant not entitled to reimbursement for attorney fees where, without petition or trial, insurer converted benefits from permanent partial to temp total and then to perm total upon receipt of additional information and claimant dropped lump-sum conversion petition and insurer then quickly agreed to partial lump sum advance. DLI affirmed.

NANCY LEE PASHA v. NATIONAL UNION FIRE OF PITTSBURGH
WCC No. 9602-7504

Order Awarding Costs [5/28/97]

Order Amending Findings of Fact [4/23/97]
KEY WORDS: *AMENDED FINDINGS, *ATTORNEY FEES, *PENALTY, *REASON- ABLENESS

Finding and conclusion regarding reasonab leness of insurer's conduct in refusing referral

of claimant to Mayo Clinic amended where they did not fully reflect the Court's analysis. Final conclusion finding that insurer's conduct reasonable reaffirmed.

Findings of Fact, Conclusions of Law and Judgment [2/26/97]
KEY WORDS: *REASONABLE MEDICAL EXPENSES, *RELATEDNESS, *CAUSATION , *MEDICAL TESTIMONY, 39-71-704 (1991).

Insurer is liable for examination of claimant at Mayo Clinic where (1) several doctors recommended such examination, (2) Montana physicians had been unable to definitively diagnose or explain claimant's chronic neck and arm complaints, (3) additional tests were recommended by Montana physicians, (4) claimant is presently permanently totally disabled and dysfunctional, and (5) claimant is several years from normal retirement. Insurer is not liable for treatment of claimant's leg complaint since she failed to establish that those complaints are related to her industrial accident. No attorney fees or penalty since insurer relied on medical opinion from Mayo doctor in denying payment for Mayo.

STEVE CHURCH V. TRAVELERS INDEMNITY COMPANY OF ILLINOIS
WCC No. 9702-7698

Findings of Fact, Conclusions of Law and Judgment [5/27/97]
KEY WORDS: *LABOR FACTOR, *PERMANENT PARTIAL DISABILITY,* REASONABLENESS, *ATTORNEY FEES,* PENALTY.

Insurer determined that claimant was performing heavy labor before his industrial accident on January 17, 1995, and that following his accident he could perform labor which falls between the light and medium classifications. Section 39-71-703 (1993), MCA, specifies a 15% award where the worker was performing heavy labor and post-injury can only engage in medium labor, and 20% where post-injury he or she can only perform light labor. The insurer split the difference and the Court previously held that its approach does not comply with the statute, which on its face requires payment of 20% where the claimant does not meet the definition of medium labor. At trial the insurer contended that claimant was in fact performing medium labor, but it failed to muster a prima facia case for its belated trial theory. Awarded 2.5% (to bring the total award to 20%). Insurer's position found unreasonable and attorney fees and penalty awarded.

Order on Addendum of Documents Produce for *in Camera* Inspection [5/1/97]

Order Denying Motion for Summary Judgment [4/28/97]
KEY WORDS: *SUMMARY JUDGMENT, *LABOR CAPACITY, *PERMANENT PARTIAL DISABILITY, *39-71-703 (1993), *REASONABLENESS, *PENALTY, *ATTORNEY FEES.

Claimant's motion for summary judgment regarding his entitlement to a permanent partial disability percentage based on reduction in labor capacity **denied** where respondent presented *prima facie* issue regarding claimant's job pre- and post-injury. However, respondent's argument that where a worker's restrictions fall between light and medium the insurer can "split the difference" is contrary to the plain provisions of section 39-71-703, MCA, (1993) and is an unreasonable position. Its position concerning claimant's pre-and post injury job also appears to fly in the face of its prior payment of a 17.5% factor for loss of labor capacity and raises questions as to the reasons for and reasonableness its present contention.

Order On *In Camera* Inspection [4/24/97]

JOE YARBOROUGH v. MMIA/CITY OF BILLINGS
WCC No. 9505-7309

***Yarborough v. MMI*, _____ Mont. _____ , _____ P.2d _____, _____ St. Rep. _____ (1997). AFFIRMED 5/20/97**
KEY WORDS: *INJURY, *MENTAL STRESS, *PTSD, *39-71-119(1987), **STRATEMEYER*, *MEDICAL EVIDENCE.

Affirmed WCC's conclusions. SC relies in part on expert medical testimony.

Findings of Fact Conclusions of Law and Judgment [6/28/96]
KEY WORDS: *INJURY, *MENTAL STRESS, *PTSD, *39-71-119.

Disabling psychological injury not compensable where it is not the result of physical injuries. In this case the claimant suffered PTSD from the shock of an explosion. He suffered minor burns but the fear or psychological shock of the incident, not the burns, were the cause of his PTSD.

BLOWERS v. MT INS. GUARANTY ASSOC.
WCC No. 9412-7192

Order Amending Findings of Fact [5/19/97]
KEY WORDS: AMENDED FINDINGS , ATTORNEYS.

Finding of Fact 12, concerning claimant's ownership interest in land and disclosure of that interest, is deemed amended by discussion in ORDER AMENDING FINDINGS OF FACT. The Order is the result of a letter of claimant's counsel objecting to language in the original finding which stated that the Court was disturbed that counsel did not point out the fact of claimant's ownership interest in the land and that the Court was left to ferret that fact out from exhibits in the case. Counsel correctly points out that his proposed findings also refer to her ownership interest. However, in light of clearly misleading deposition testimony by claimant and her father to the effect that the land was owned solely by claimant's parents, the Court believes that stronger

action than 2 sentences in 18 pages of single spaced findings and a single reference in exhibits 1" thick was warranted. It would have been more appropriate for counsel to correct the misimpression during the depositions if he was aware of the ownership interest at that time, to cause the deponents to correct the depositions in writing, or at least mention the matter in opening statement. My criticism should be as an attack on counsel's integrity or competence, only as my belief that under circumstances such as these counsel should take stronger action to correct plainly misleading testimony on a matter of critical importance to an issue in the case.

Findings of Fact, Conclusions of Law and Judgment [4/25/97] SETTLED & DISMISSED 8/27/97

KEY WORDS: *LUMP-SUM ADVANCE, *BENEFICIARY, *WIDOW, 39-71-741 (1985), 39-71-721 (1983).

Petitioner, a beneficiary and widow of a deceased worker, is not entitled to lump sum advance for new home, payment of a travel trailer loan, an $18,000 tractor, a business plan. and real property in which she is a joint tenant. Her income is adequate to meet her needs. She has not shown good fiscal judgment. She has not shown the ability to take care of a home -- her present trailer home is in unexplained disrepair and she has not undertaken efforts to repair it. As joint owner of the land for which she seeks money to pay her parents, she is entitled to equal possession, making payment unnecessary. The tractor is proposal is extravagant beyond belief. She has shown no interest, ability, motivation or skills to manage a business.

Partial Summary Judgment [10/15/96]

KEY WORDS: *39-71-721(1985), *39-71-741 (1985), *DEATH BENEFITS, *FEASIBILITY STUDIES, *JURISDICTION LUMP SUM,*WIDOW

Widow not limited to lump summing only 2 years of death benefits but two-year limitation of benefits upon remarriage is a significant factor which must be considered by the Court in any award. When petition requests lump sum, Court has jurisdiction to order insurer to pay for feasibility studies.

Order Joining Additional Party, Requiring Guardian Ad Litem, Requiring Parties to File Report with Court, and Vacating Trial Setting [2/28/95]

KEY WORDS: *LUMP SUM, *GUARDIAN AD LITEM.

Petitioner seeks a lump-sum conversion of future death benefits on her own behalf and on behalf of her minor son. The Court determined the minor child should be represented by a guardian ad litem, *Hock* (1981), and that petitioner must present the respondent and the Court with an economic justification for conversion of death benefits.

DARWIN ZEMPEL v. UNINSURED EMPLOYERS' FUND
WCC No. 9510-7408

***Zempel v. UEF*, ____ Mont. ____ , ____ P.2d ____, ____ St. Rep. ____ (1997) AFFIRMED 5/15/97.**

KEY WORDS: *EQUAL PROTECTION, *INDIANS, *JURISDICTION, *RIGHT OF REDRESS, *UNINSURED EMPLOYERS' FUND, *39-71-501(1991), *CONSTITUTIONAL, *RATIONAL BASIS TEST, *ARTICLE XII, SECTION 3(3).

Workers' Compensation Court did not err in concluding that Zempel was not denied equal protection under 39-71-501, as applied. Zempel may not have judicial access under the WC Act, but is not precluded from pursuing non-Act claims against the employer. Lack of coverage due to fact that injury occurred on the reservation while working for a tribally-owned business, not unconstitutional under equal protection clause or right of access to courts.

Declaratory Judgment [2/21/96]

KEY WORDS: *COMITY, *EQUAL PROTECTION, *INDIANS, *JURISDICTION, *RIGHT OF REDRESS, *UNINSURED EMPLOYERS' FUND.

Business owned by enrolled tribal member and operated solely on the Flathead Reservation is not required to carry workers' compensation insurance for its employees. UEF not liable for injured worker since such employer not uninsured within meaning of Act. Such lack of coverage not unconstitutional under equal protection clause or right of access to courts.

JEANNETTE BOWERS v. DLI/STATE FUND
WCC No. 9609-7611

Order on Appeal [4/29/97]

KEY WORDS: *OCCUPATIONAL DISEASE, *OCCUPATIONAL DISEASE PANEL, *39-72-608, *39-72-605.

Beneficiary of deceased worker allegedly suffering from an occupational disease is not liable for expense of medical panel evaluation conducted under 39-72-605 even though she was the party requesting the exam. Section 39-72-608 provides for the requesting party to pay for the exam but only "**when the occupational disease causes death**." Where the legislature intended the filing of a claim, rather than actual cause, as the triggering event, it used language referring to a "claim," i.e., 39-72-605. Thus, in referring to cause it must have intended to require an acknowledgment or finding of occupational disease as the cause of death as a prerequisite to payment. Since this claim has neither been accepted nor adjudicated as compensable, the prerequisite is not met and, lacking any other provision, the Department must pay for the exam.

RUTH CARLSON-OWENS V. LIBERTY NORTHWEST INS. CORP.
WCC No. 9701-7691

DISMISSED WITH PREJUDICE 12/12/97

Findings of Fact, Conclusions of Law and Judgment [4/28/97]

KEY WORDS: *39-71-703 (1995), *39-71-116(1) (1995), *39-71-116(22) (1995), *39-71-1006 (1995), *IMPAIRMENT, *PERMANENT PARTIAL DISABILITY, *REHABILITATION BENEFITS, *MEDICAL EVIDENCE, *MEDICAL OPINIONS.

Under 1995 statutes, claimant is not entitled to further permanent partial disability benefits or rehabilitation benefits for either of two injuries she suffered. As to the first injury, she failed to provide evidence that she suffered a permanent, rateable impairment as a result of her injury. Such impairment is a prerequisite to PPD benefits. As to the second, she established a rateable impairment for which she has received an appropriate impairment award, but failed to establish an actual loss of wages, which is also a prerequisite to further benefits and to rehabilitation benefits. Post-injury "actual wages" are defined by statute as "the wages that a worker earns **or is qualified to earn** after the worker reaches maximum healing." The evidence presented by the insurer demonstrated that claimant is capable of earning more than her time-of-injury wage.

RICHARD WARE v. STATE FUND
WCC No. 9612-7667

Order Denying Defense of *Res Judicata* [4/25/97]

KEY WORDS: *ATTORNEY FEES, *PENALTY, *RES JUDICATA.

Res judicata inapplicable to request for attorney fees and a penalty since that relief is not inextricably intertwined with claimant's previously adjudicated entitlement to temporary total disability benefits and the medical benefits as to which he also asks that attorney fees and penalty be attached were never the subject of an adjudication. The "opportunity to litigate" language which is part of the "res judicata doctrine" refers only to issues that were required to be adjudicated in the prior action, such as compulsory affirmative defenses.

Appealed 6/12/96 - Dismissed 9/11/97.

Findings of Fact, Conclusions of Law and Judgment [5/15/96]

KEY WORDS: *CONTRACT FOR HIRE, *TEMPORARY TOTAL DISABILITY, *WAGES, *WEAVER, *39-71-116(23), MCA (1991), *39-71-123(1), MCA (1991).

Claimant not entitled to temporary total disability benefits where he continues to work, albeit less than full time and not every week, as a carpenter. By his work he has demonstrated a residual normal labor market of jobs he can perform and therefore has not proven a complete inability to work. When surgery was indicated, however, and he had stopped working, he is entitled to TTD benefits.

JAMES JACQUES V. BORDEN, INC.
WCC No. 9611-7657

Order Rescinding Grant of Attorney Fees [4/22/97]
KEY WORDS: *ATTORNEY FEES, *SANCTIONS, *MOTION TO COMPEL, *DISCOVERY

After hearing, the Court rescinds previous order awarding attorney fees and costs in connection with the denial of a motion to compel discovery. Attorney fees were not appropriate nor warranted under the circumstances.

Order Denying Motion to Dismiss and Compel [4/22/97]
KEY WORDS: *MOTION TO COMPEL, *PRODUCTION, *MOTION TO DISMISS, *JUSTICIABILITY.

Insurer's motion to dismiss for lack of justiciability denied where insurer denies that statute precludes mental impairment awards altogether and that issue has been mediated. Insurer's motion to compel medical records of third parties denied because most of the records are irrelevant and all of the records are not under the petitioner's control.

Order Denying Motion to Require Proper Signing of Discovery and Awarding Respondent Attorney Fees [3/20/97]
KEY WORDS: *ATTORNEYS, *ATTORNEY FEES, *INTERROGATORIES, *MOTION TO COMPEL DISCOVERY, *SANCTIONS.

Motion requesting order directing corporate official or agent, other than its attorney, sign and verify answers to interrogatories denied. Rules permit attorney signature. Attorneys fees imposed on moving party since motion was more in the nature of hardball, in your face, litigation tactics than a good faith attempt to secure necessary discovery.

Order Granting Partial Summary Judgment [3/20/97]
KEY WORDS: *39-71-703 (1989), *39-71-711 (1989, 1995), **BLYTHE*, *LAW IN EFFECT, *IMPAIRMENT AWARD, *PERMANENT PARTIAL DISABILITY.

Permanent partial disability statutes do not on their face preclude an impairment award based on a psychological impairment rating. However, any final rating must satisfy all statutory criteria and may not be rendered by a psychologist.

DONALD BAUMGARTNER V. LIBERTY NORTHWEST
WCC No. 9611-7642

DISMISSED WITH PREJUDICE 6/10/97
Order Awarding Costs [5/9/97]
Findings of Fact, Conclusions of Law and Judgment [4/14/97]
KEY WORDS: *39-72-405(2), *39-72-706(1), *APPORTIONMENT, *ESTOPPEL, *JURISDICTION, *OCCUPATIONAL DISEASE.

Claimant filled out a FIRST REPORT OF OCCUPATIONAL INJURY OR OC CUPATIONAL DISEASE after he began feeling low-back pain on August 15, 1995. Despite a prior history of low-back pain and his statement on the form that he could not recall any specific incident causing the onset of the latest episode, the insurer accepted his claim under the WCA an d opposed his request for $10,000 unde r ODA section 39-72-405(2), MCA. Insurer agreed that if the claimant was not estopped from proceeding under the ODA, then he suffer s from an OD but should be awarded only 60% of $10,000 since the insurer's docto r apportioned his condition 60% to occupational factors. After trial, the Court held tha t claimant was not estopped and that section 39-72-706(1), MCA, (the apportionmen t statutes) applies to ALL compensation, including that under 39-72-405(2), MCA. $6,000 awarded.

STAN GUEDESSE V. LIBERTY MUTUAL FIRE INSURANCE COMPANY
WCC No. 9701-7690

Judgment [4/2/97]
Order Denying Motion for Reconsideration and Limiting Evidentiary Issues a t Trial [3/20/97]
Order Denying Motion for Partial Summary Judgment [3/12/97]
KEY WORDS: 39-71-1 19, 39-71-601(1), 39-71-608, *ACCEPTANCE, *CLAIM, **HAAG*.

The requirement that an insurer accept or deny a claim for compensation within 30 days of receipt of the claim applies only to a valid claim which sets forth information which, if true, consti tutes an industrial accident or injury. Where the claimant submitted a clai m which did not set forth any specific occurrence or a date and place of injury, the claim is deficient on its face and the insurer's failure to accept or deny it within 30 days does not amount to an automatic acceptance of the claim. Haag distinguished.

STEVEN KUYKENDALL V. LIBERTY NORTHWEST
WCC No. 9611-7646

Findings of Fact, Conclusions of Law and Judgment [3/17/97]
KEY WORDS: *COURSE AND SCOPE, *FIGHT, *HORSEPLAY, **PENNY*, **PINYERD*.

Claimant who was injured in a fight at work was in the course and scope of hi s employment at the time of the injury where the fight wa s the consequence of a coworker's deliberate interfer ence with claimant's work, which in turn led to a confrontation between claimant and the coworker. The test of liability is whether there was a relationshi p between the injury and the employment. Since the fight arose out of and was triggered by a coworker's interference with claimant's work, such relationship exists. Insurer liable.

TIMOTHY PARTIN V. STATE FUND
WCC No. 9605-7605

Decision on Appeal [3/14/97]

KEY WORDS: *39-71-601, *CLAIM, *CLAIM FILING, *CREDIBILITY, *ESTOPPEL, *JURISDICTION,* STATUTE OF LIMITATIONS, *WAIVER.

If claimant's testimony is believed, the employer and insurer are estopped from asserting the one-year statute of limitations applicable to the filing of a written claim and the DLI should have granted claimant a waiver for that additional time, thus making his formal written claim, filed approximately sixteen months after his injury, timely. However, the hearing examiner failed to expressly decide credibility issues or resolve the conflicting stories. According to claimant, the employer expressly requested that he not file a WC claim and promised to reimburse claimant for out-of-pocket expenses if he had his medical providers bill his regular health insurer. Those facts, if true, satisfy the elements for estoppel. Remanded for further findings on credibility.

Additionally, the hearing examiner's finding that the written report, which claimant says he submitted on the day after the accident, was legally insufficient was in error. § 39-71-601(1) does not require any particular form of claim. The report in question provided information setting out the specifics of the accident and identifying claimant, although not by name. If submitted, it was sufficient. The hearing examiner did not determine whether in fact it was submitted but in any event had no jurisdiction to address the issue in the first place since it did not pertain to the waiver. The issue should have been submitted to the Court and the parties are still free to do so.

Order Denying Motion to Present Additional Evidence [1/13/97]

KEY WORDS: *ADDITIONAL EVIDENCE, *JUDICIAL REVIEW, *GOOD CAUSE.

Motion to present additional evidence in case on appeal from decision of the Department of Labor and Industry **denied** where one witness was tendered at the Department hearing but not allowed to testify because of moving party's failure to timely list him as a witness and where the other witness was known to the moving party all along and no good reason was given for the moving party's failure to call the witness at the hearing.

MARGARET EPPERSON v. WILLIS CORROON ADMIN. SERVICES
WCC No. 9606-7558

Epperson v. Willis Corroon Admin. Serv., _____ Mont. _____, _____ P.2d _____, _____ St. Rep. _____ (1997). **AFFIRMED** (3/11/97)

KEY Words: *39-72-612, *ADMINISTRATIVE REVIEW, *TIME BARRED, *OCCUPATIONAL DISEASE, *ARM 24.29.205, *24.29.206, *24.29.207, *24.29.215.

The 20-day period for requesting a hearing before the Department of Labor does not

commence until the order is final and an order is not final until the Commissioner has completed her administrative review or until the time for seeking review (90 days) expires. Thus request filed within 90 days was timely.

Order on Appeal [8/29/96]

KEY WORDS: *39-72-612, *REQUEST FOR HEARING, *TIME FOR REQUESTING *HEARING, *TIME BARRED, *ARM 24.29.205, *24.29.206, *24.29.207, *24.29.215.

Twenty day period to request hearing in occupational disease case runs from the time of a **final** order. Since Department's rules allow for informal "administrative review" of OD determination order, which may change the order, the order is not final until the time for such review has expired. Thus request filed in 90 days is timely. Remanded for hearing.

ROSA M. MARTINEZ V. STATE FUND
WCC No. 9611-7654

Decision and Judgment [3/5/97]

KEY WORDS: *PENALTY, *ATTORNEY FEES.

Industrial accident occurred on November 27, 1995. A claim was filed in late April 1996 and denied by the insurer in May 1996. The insurer finally accepted the claim on January 6, 1997, and conceded that its failure to accept liability for the claim as of October 9, 1996 was unreasonable and subjected it to a penalty and attorney fees for benefits and medical expenses incurred between October 9th and January 6th. Held: As a matter of law the penalty and attorney fees are payable with respect to all benefits and medical expenses accrued prior to October 9th since as of October 9th the failure to pay the past benefits was also unreasonable.

LINDA KLEIN V. LIBERTY NORTHWEST INSURANCE CORP.
WCC No. 9608-7591

Findings of Fact, Conclusions of Law and Judgment [3/4/97]

KEY WORDS: *MAXIMUM MEDICAL HEALING, *FIBROMYALGIA, *MEDICAL TESTIMONY, *DIAGNOSIS, *AGGRAVATION, *TEMPORARY TOTAL DISABILITY, *PRIMARY MEDICAL SERVICES, *PERMANENT PARTIAL DISABILITY, *DUTY OF CLAIMANT, *ATTORNEY FEES, *PENALTY, *39-72-116 (1995), *39-71-701(1995).

Claimant aggravated preexisting back condition in industrial fall. (1) Conflicting medical testimony resolved in finding that claimant did not reach maximum healing in September 1995 but rather reached that status in August 1996. Diagnosis of and prescribed

treatment for fibromyalgia found to be the most appropriate for claimant's condition. (2) Medical testimony failed to establish any permanent effect from the aggravation. Therefore, claimant's requests for (3) permanent partial disability and (4) future treatment denied. (5) Claimant must follow treating physician's treatment prescription, including prescription for exercise, unless treatment unreasonable or claimant's psychological condition so severe as to deprive her of volition. No attorney fees or penalty since insurer reasonably relied on medical opinions in terminating claimant's temporary total disability benefits and denying permanent partial benefits.

ANTONIO J. ESTRADA V. STATE FUND
WCC No. 9608-7582

Order Denying Motion for Reconsideration [2/6/97]
KEY WORDS: *STATUTE OF LIMITATIONS, 39-71-601, *WRITTEN CLAIM, **HAAG*.

Motion for reconsideration of partial summary judgment denied. The claim submission statute, 39-71-601, does not require the jurisdiction or specific insurer be designated by the insurer. Nor does the Supreme Court in *Haag* state that the duty for an insurer to accept or reject a claim commences at any time other than its receipt of a claim.

Partial Summary Judgment [1/14/97]
KEY WORDS: *39-71-601, *STATUTE OF LIMITATIONS, *STATUTORY INTERPRETATION.

Section 39-71-601, which requires that a claim be filed within one year, permits the claim to be filed with the employer, the insurer OR the Department. Thus, submission to the employer is adequate.

RUTH WIEGLENDA v. STATE FUND
WCC No. 9506-7562

Motion Granted to Proceed in Forma Pauperis (2/4/97)

Decision and Judgment [10/23/96] **AFFIRMED 12/9/97**
KEY WORDS: *CONSTITUTIONAL LAW, *EQUAL PROTECTION, *DUE PROCESS, *CRUEL AND UNUSUAL PUNISHMENT, *BRIEFS.

The 1993 legislation omitting benefits for maintenance and palliative medical does not violate equal protection and due process clauses and does not amount to cruel and unusual punishment. Claimant's brief did not cite relevant legal principles or cases. Future briefs of this nature will be returned to counsel.

JACQUI WALLS v. TRAVELERS
WCC No. 9509-7385

Walls v. Travelers, 54 St. Rep. 82 (1997) **Affirmed 1/23/97.**
KEY WORDS: *ACCIDENT, *CREDIBILITY, *SUBSTANTIAL EVIDENCE.

The judgment of credibility and demeanor of the witnesses, "was grounded in the record" thus the conclusions of the Workers' Compensation Judge are supported by substantial credible evidence. Claim for compensation denied as WCC did not believe claimant's testimony that she was hurt at work.

Findings of Fact, Conclusions of Law and Judgment [1/17/96]
KEY WORDS: *ACCIDENT, *CREDIBILITY.

Claim for compensation denied where Court did not believe claimant's testimony that she was hurt at work. Alleged accident witnessed by customer of store who testified and denied claimant's allegations. Other aspects of claimant's story were either uncorroborated or contradicted by credible witnesses.

ROLF BRUNO GUBLER V. LIBERTY NORTHWEST COMPANIES
WCC No. 9607-7580

Findings of Fact, Conclusions of Law and Judgment [1/6/97]
KEY WORDS: *COURSE AND SCOPE, 39-71-407 (1995), *AGGRAVATION, *COURSER V. DARBY SCHOOL DIST. # 1, *ATTORNEY FEES

Where employer commandeered truck of one of its supervisors for use in its business and supervisor directed claimant/employee to take the truck home after finishing work for the day and pick him (the supervisor) up the next morning, claimant was in course and scope of employment and the requirements of 39-71-407 were met when involved in an auto accident on his way to pickup his supervisor the next morning. He is entitled to compensation for injuries including aggravation of preexisting shoulder condition.